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Federal Statutes Affecting the Land Management Planning Functions of the Forest Service

Volume II: Analysis and Discussion

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**FEDERAL STATUTES AFFECTING THE LAND
MANAGEMENT PLANNING FUNCTIONS OF THE FOREST SERVICE**

Volume II: Analysis and Discussion

by

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USDA Forest Service

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Preface

Volume II culminates an extensive research project conducted for the USDA Forest Service at the Texas Tech University School of Law. The objectives of this volume were in-depth analyses of the federal statutes having major relevance to the Forest Service land planning and management functions and discussion of those statutory planning provisions and performance standards. This work has been prepared for use principally by Forest Service personnel involved in land planning and management activities, who typically are not lawyers. The writing minimizes the use of legalese and jargon. The goal is to provide Forest Service land managers with a better understanding of the interaction between the statutes and their daily activities.

The statutes included were selected for more detailed discussion because of their impact on Forest Service land management planning functions. The textual analysis is not a legal opinion or interpretation of the statutes, either generally or in a particular context. Instead it examines and develops the meaning of the statutes from cases, legislative histories, and administrative application. This facilitates a broader, practical application of them. This statutory analysis should not be used to resolve particular problems in a specific situation. Ideally, it should show the types of legal questions involved at different stages of the planning process to help identify when formal legal advice may be helpful.

The approach of the legal analyses of Volume II has been one of "preventive law." The purpose is to illustrate the legal requirements and problems and to provide specific suggestions on how to avoid them. The administrative law material is included because of its overall importance to the agency decisionmaking process. That material

begins with the procedural and other requirements imposed on agency action. The administrative law material then examines how and why agency decisions are reviewed, the scope of review, and standards that courts apply to determine whether statutory requirements have been satisfied. It is hoped that by understanding the judicial review process, agency personnel, in particular the decision-makers, will better understand methods to identify and avoid legally questionable decisions.

Chapter VI on planning uses and freely draws from the statutory analysis in Chapters I-V. It examines the practical application of the statutory requirements to the Forest Service planning process. This chapter also uses and applies the planning sheets in Volume I in conjunction with the statutory analysis in Volume II as a framework to develop a planning model. It considers the practical consequences of the statutory requirements, and how and where the statutory requirements and performance standards can be satisfied in the planning process. The result is suggestions for the content of a model integrated forest plan.

It should be noted that because Volume II has multiple authors, there are discrepancies in style and approaches within each chapter. The time required to achieve a uniform style was not considered justified in terms of the minimal benefits which would be derived from that uniformity. In no way does the lack of the uniform style detract from the substantive content of any of the materials. Also, footnotes are contained at the end and numbered consecutively within each chapter or longer chapter sections. Footnote style comports with that used generally for legal research, although it has been abbreviated often for simplicity. The pages within each chapter have been numbered separately and consecutively through the footnote pages for each chapter.

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I. Forest Service Responsibilities and Jurisdiction Over Land

A. ACQUISITION AND DISPOSITION OF NATIONAL FOREST LANDS*

1. Reservation and Withdrawal

Reservation of public lands for national forest purposes was originally authorized in 1891. This authority was vested solely in the President of the United States.¹ In 1897 the reservation power was limited statutorily to authorize establishment of public forests only for the purposes of protecting and improving the forests: to maintain watersheds and waterflow, and to ensure a continuous supply of timber for American citizens.² In 1907 the presidential authority to establish reserves in the six western states of Oregon, Washington, Idaho, Montana, Colorado and Wyoming was revoked in favor of vesting the reservation power solely in Congress.³ The President's reservation power was further limited by other legislation, and finally, in 1976, that power was repealed as to all states.⁴ Any new national forest reserves now can be created only by Congress.

The implied authority of the President to withdraw public land that would otherwise have been open to public acquisition was recognized even before the Forest Reserve Act of 1891. The power of the President to make temporary withdrawals for public purposes, including the prevention of disposal of lands pending its consideration as a forest reservation, was expressly affirmed by the United States Supreme Court in the 1915 decision of *United States v. Midwest Oil Co.*⁵ The Court stated that "the power to make permanent reservations includes power to make temporary withdrawals."⁶ This authority was also repealed by the Act of October 21, 1976.⁷

In the Federal Land Policy and Management Act of 1976 (FLPMA)⁸ Congress has asserted its constitutional authority to withdraw or otherwise designate federal lands for specific purposes and to delineate the extent to which the President may withdraw lands without legislative action. But Congress has delegated to the Secretary of Interior the authority to make withdrawals in emergencies and to withdraw parcels of less than 5000 acres.⁹ As defined in the Act, a "withdrawal" contemplates a temporary "withholding" of

an area of Federal land from settlement, sale, location, or entry, under some or all of the general land laws, for the purpose of [1] limiting activities under those laws in order to maintain other public values in the area or [2] reserving the area for a particular purpose or program; or

[3] transferring jurisdiction over an area of Federal land . . . from one department, bureau or agency to another department, bureau or agency.¹⁰

The Act has the effect of approving withdrawals of lands previously made by the Forest Service. The only withdrawals existing on lands under the jurisdiction of the Forest Service on October 21, 1976, the effective date of FLPMA, which were subject to a review within 15 years by the Secretary of Interior were those which closed lands in the National Forest System (NFS) in the sixteen contiguous western states to appropriation under the Mining Law of 1872 or the Mineral Leasing Act of 1920.¹¹

Although the term "federal land" is not defined in FLPMA, it unquestionably includes land that is part of the NFS.

Withdrawals of federal land under the Act may be classified in three categories: emergency withdrawals; withdrawals of less than 5000 acres; and withdrawals of more than 5000 acres.

In the case of emergency withdrawals, the respective limitations of the Act for ordinary withdrawals do not apply, including the requirements of consent from the affected department head or agency and a public hearing.¹² If the Secretary of Interior is so notified by the Committee on Interior and Insular Affairs of either the House or the Senate or he otherwise determines that an emergency which requires "extraordinary measures" to preserve values exists, the Secretary may make an emergency withdrawal that is effective when made. The Secretary need only file notice of the withdrawal with the Committee on Interior and Insular Affairs of both Houses. The emergency withdrawal can continue for no more than three years and can be extended only according to the procedures applicable to ordinary withdrawals.

Withdrawals of less than 5000 acres of federal land can be made by the Secretary of Interior on his own initiative or at the request of a department or agency head.¹³ The decision whether to make a less-than-5000 acre withdrawal rests solely with the Secretary of Interior. The Secretary's discretion is limited by the purposes included in the statutory definition of withdrawal and by the requirement that the consent of the affected agency be obtained. Land may be withdrawn: (1) to maintain public values in the area; (2) to reserve the area for a particular purpose; or (3) to transfer jurisdiction to another agency or department.¹⁴ The permissible period of the withdrawal varies with the purpose: (1) up to five years to preserve the tract for a specific use being considered by Congress; (2) up to twenty

* The notes for Part A begin on p. 5.

years for uses other than resources uses; and (3) any period of time the Secretary "deems desirable for a resource use."¹⁵

Withdrawals of more than 5000 acres can be made by the Secretary of Interior on the Secretary's own or at the request of another department or agency head, but will be subject to review and possible veto by Congress.

An over-5000 acre withdrawal must be submitted to Congress for its review. When a withdrawal is made, that land is segregated from the operation of the public land laws to whatever extent is specified in the public notice of intent to withdraw required to be published by the Secretary of Interior in the Federal Register. A detailed report justifying the withdrawal must be submitted within three months of the notice of an emergency withdrawal.¹⁶ The Act specifies that the Secretary of Interior must submit this report to accompany, or be submitted within three months of, the notice of an emergency withdrawal. However, the publication requirements do not apply to a notice of an emergency withdrawal.¹⁷ Although the Act specifies that the Secretary of Interior must furnish this report, the agency requesting the withdrawal could be responsible for compiling the report for the Secretary of Interior. Congress can disapprove a withdrawal of more than 5000 acres by adopting a concurrent resolution. If such a concurrent resolution is adopted, the withdrawal terminates and is ineffective when 90 days have passed from the date Congress was notified of the withdrawal by the Secretary of Interior. The maximum period of an over-5000 withdrawal is 20 years.¹⁸

A pending application for withdrawal must be processed and adjudicated before its termination or within 15 years of October 21, 1976, to determine whether it should be terminated, extended, or modified.¹⁹ But the Secretary of Interior cannot modify or revoke any withdrawal that can be made only by Congress, or that creates a national monument, or that adds lands to the National Wildlife Refuge System.²⁰

The provisions of this Act relating to withdrawals eliminates the President from the withdrawal process. In withdrawals aggregating more than 5000 acres, the Congress has given itself veto authority. The effect of withdrawals of public lands under this section is to segregate the land from the operation of public land laws to whatever extent is specified by the Secretary of Interior whenever the notice of intent to withdraw the land is published. The authority to make withdrawals is granted only to the Secretary of Interior. However, the heads of other departments can, of course, request a withdrawal by the Secretary of Interior. Withdrawals of less than 5000 acres can be made by the Secretary of Interior without the veto power of Congress coming into play.

Withdrawals made after the effective date of this statute have a time limit of 20 years. They must be reviewed at the end of the period for which they are made to determine whether or not the purpose for which they were originally withdrawn requires extension of the withdrawal. However, the Secretary of Interior can only modify, revoke, or make withdrawals with the consent of the agency or department head having jurisdiction of the land withdrawn. By 1991 the Secretary of Interior must review withdrawals of public lands in the national forest system which are closed to operation of mining laws except that land in wilderness areas, primitive areas, or national recreation areas.²¹

2. Purchase

When President Theodore Roosevelt left office in 1908, the national forests included an estimated 150 million plus acres. The bulk of the additions since then have been the result of the purchase of cut-over lands east of the Rockies under the Weeks Act and the purchase of Bankhead-Jones Act land from farmers and ranchers in the Depression, which land was transferred from the Soil Conservation Service to the Forest Service in 1954.²² The Weeks Law of 1911 authorized purchase of forested, cut-over, or denuded lands for the protection of the flow of navigable streams.²³ This authorization was extended by an amendment to include acquisitions solely for timber production.²⁴ The Weeks Act authorization to purchase was originally directed to the National Forest Reservation Commission. The Secretary of Agriculture was directed only to examine, locate, and recommend for purchase those lands outlined above. The Commission, however, was abolished and its powers, including the power to purchase land, were transferred to the Secretary of Agriculture in 1976 by the National Forest Management Act.²⁵ Those lands described above can be acquired for forest lands even if they are subject to easements, rights-of-way, or reservation retained by the seller if those uses will not interfere with the use of the land by the Forest Service.²⁶

When land is sought to be acquired under the Weeks Act authorization and its cost is more than \$25,000, the Secretary of Agriculture must submit a report to Congress. The report must be submitted to the House Committee on Agriculture and then to the Senate Committee on Agriculture and Forestry. The report must contain the guidelines the Secretary has used to decide that the lands should be acquired, the location and size of the land, the purchase price of the land and how that price was arrived at,²⁷ and the person from whom the land is being acquired. The requirement of submitting this report must be met before the Secretary of Agriculture can enter into any land purchase agreement under the Weeks Act authorization.

Land could be acquired by the Secretary from 1937 to 1962 under the authorization of the Bankhead-Jones Farm Tenant Act of 1937.²⁸ That Act authorized the Secretary to acquire submarginal lands and lands not suitable for cultivation. The purposes of such acquisition were correction of maladjustments in land use and control of soil erosion, reforestation, preservation of natural resources, protection of fish and wildlife, mitigation of floods, prevention of impairment of dams and reservoirs, conservation of surface and subsurface moisture, protection of the watersheds of navigable streams, and protection of the public lands, health, safety, and welfare.²⁹ These purchases were stopped in 1962 although lands acquired under the authorization still remained subject to other provisions of the statute.³⁰

The Land and Water Conservation Fund (LWCF) that was established in 1965 also has provided substantial sums of money for national forest purchases. Under the Act the Forest Service may purchase inholdings within wilderness areas and other areas within the boundaries of national forests which other areas are "primarily of value for outdoor recreation purposes." The Forest Service also may acquire, with money from the LWCF, up to 3000 acres of land per national forest that is adjacent to an existing national forest boundary if such land would comprise an integral part of a forest recreational management area.³¹

Land purchases have also been authorized for general administrative needs of the Forest Service. Specifically it includes land acquisition for the erection of forest headquarters, ranger stations, dwellings, and other "authorized activities of the Forest Service."³² The funds for these purchases must come from the authorization covering the activity for which the land will be used. A parallel authorization is also found for the Department of Agriculture in general to acquire land for carrying on its "authorized work."³³ The Secretary has been authorized to acquire the right to use land for fire look-out towers³⁴ and water rights which are necessary or beneficial for administration or public use of NFS lands.³⁵

Purchases of land have been authorized to secure access to NFS lands³⁶ and for national recreation, scenic, and historic trails.³⁷ The access acquisitions can also be made by donations or by eminent domain.³⁸ Those acquisitions, however, must be consistent with land use management plans and with the Forest Service's mission.³⁹ There have been many other specific authorizations for purchases of lands which apply only to specific locales.⁴⁰

In acquiring lands by purchase, the Secretary must have the land appraised and make a reasonable attempt to consummate the purchase through negotiation with the owner.⁴¹ The price offered by the Forest Service should be no less than the appraised value of the land but the price offered

should not be affected by increases in value resulting from the public improvements.⁴² The purchase price should be paid before requiring the surrender of land by the occupants, and, if possible, the agency should attempt to give 90 days notice before requiring a person to move from a dwelling.⁴³ An agency should not use coercive condemnation actions to compel an agreement.⁴⁴ If a partial taking would destroy the economic worth of the remainder, the agency should acquire the entire tract.⁴⁵ The agency should also consider what value the buildings and other structures add to the fair market value of the land.⁴⁶ The Forest Service will reimburse the owner for recording fees, transfer taxes, and similar expenses incurred in conveying title. Also, reimbursement should be made for penalty cost of a mortgage and the pro rata portion of real property taxes.⁴⁷ If land cannot be acquired by negotiation and a federal court finds the agency cannot exercise eminent domain after such proceedings have been instituted, or if the agency abandons condemnation proceedings, the owner of the property will be entitled to receive costs, including attorney, appraisal, and engineering fees, incurred as a result of the proceedings.⁴⁸

Payments for relocation must be made to persons eligible for their relocation expenses.⁴⁹ For those persons displaced by real property acquisitions of the Forest Service, the chief of the Forest Service shall make payments for:

1. actual and reasonable moving expenses (or alternatively a moving expense allowance);⁵⁰
2. direct losses of tangible personal property, as a result of discontinuing the business or farm operation, which do not exceed reasonable expenses required to relocate this property (or alternatively a fixed payment based on annual net earnings);⁵¹
3. actual and reasonable expenses in searching for a replacement business or farm.⁵²

Replacement housing payments may be determined by examining reasonable acquisition costs or rental rates of comparable dwellings or by other methods.⁵³ Persons eligible for replacement housing payments are those who have owned and occupied the dwellings acquired by the Forest Service for not less than 180 days. The payments may include the amount necessary to acquire a comparable replacement dwelling, increased interest costs of the replacement dwelling, and expenses incurred in conveying the property and acquiring the new property, such as title searches, credit report, and recordation fees.⁵⁴

Replacement housing payments may be made to renters or lessees who are displaced by NFS land acquisitions. These payments include rental payments paid, or those payments of a comparable dwelling. These payments may also cover down-payments necessary to acquire replacement housing as well as expenses incurred in acquiring

replacement housing (title searches, credit reports, recordation fees).⁵⁵ The above regulations also apply to occupants of mobile homes. If the mobile home occupant is a home-owner or a tenant, then the appropriate regulations come into play. The Forest Service must provide a relocation assistance advisory program for displaced persons.⁵⁶

Before any funds may be expended for the purchase of lands to be national forest lands, the Attorney General of the United States must certify in writing that title to the land is sufficient for the purposes for which the land is being acquired.⁵⁷ Even though the title is sufficient, the Secretary of Agriculture may reconvey lands by quit claim deed if he finds that the title is insufficient for the purposes for which the land was acquired.⁵⁸ The quit claim deed should be executed to the person who conveyed the land to the United States if the government has not paid for the land or if the person has returned the amount that has been paid to him. This authorization to execute quit claim deeds does not apply to acquisitions made by exchange.⁵⁹

3. Exchanges

Authority for the Secretary of Agriculture to make exchanges with private parties of land under his jurisdiction comes from several statutes: the Exchange Act of 1922;⁶⁰ the Weeks Law of 1911, as amended by NFMA;⁶¹ and the Forest Service Omnibus Act of 1962.⁶² But the substantive procedure to be followed is largely set out in FLPMA. Congress has authorized exchange of NFS lands for lands within the boundaries of the national forests to protect the flow of navigable streams,⁶³ to secure access to NFS lands,⁶⁴ and to use in connection with Forest Service activities.⁶⁵

Exchanges can be proposed by either the Forest Service or the non-federal landowner. The first step toward accomplishing a proposed exchange is an appraisal of both tracts of land, or only of the non-federal land to be acquired if the exchange is to be made through timber removal. The Secretary is authorized to convey NFS land only in the same state as the non-federal land to complete the exchange.⁶⁶ If the exchange is pursuant to 16 U.S.C. § 485, only surveyed, non-mineral land may be transferred by the Secretary.⁶⁷ Alternatively, timber can be cut and removed from a national forest in the same state to pay for the non-federal land being acquired.⁶⁸ After determining that the values of the land acquired and that conveyed (or timber removed) are equal, the negotiations may continue until an exchange is agreed upon.

Before an exchange can be consummated under the authority of sections 485 or 516, public notice must be given. The statutes specify the same procedure: weekly notice for four successive weeks in a newspaper of general circulation in the county or counties where the lands or timber involved is located.⁶⁹

FLPMA speaks to two points in the exchange process: the required finding of benefit to the public interests, and the requirement that values in an exchange be equal. The Act specifies definite factors to be considered in determining benefit to the public. In making an exchange, the Secretary of Agriculture must fully consider "better Federal land management and the needs of State and local people, including needs for lands for the economy, community expansion, recreation areas, food, fiber, minerals, and fish and wildlife. . . ." The Secretary must also find that the values and objectives to be served by an exchange are not less than the values of retention.⁷⁰ These factors must be considered when the Forest Service undertakes any exchange regardless of the statutory authority under which it is being made. Authorizations for the exchange of NFS lands had required that the monetary values in the exchange be equal (the values to be determined by the Secretary). This has been changed by FLPMA.⁷¹ Payments of cash can be made by either party to the exchange to equalize the values as long as such payments do not exceed twenty-five (25) percent of the value of the federal land being transferred in the exchange.

Acquisitions of lands by an exchange for access to NFS lands is specifically authorized by FLPMA.⁷² As previously noted in connection with purchases, access acquisitions must be consistent with land use management plans and with the Forest Service's mission.⁷³ Further, as with other exchanges, the Secretary must determine that the values to be attained with the acquired land are no less than the values which would be achieved by retention of the land. The Secretary must consider the public interest in general and the needs of the state and local population in particular.⁷⁴ Either party to an exchange may reserve rights to timber, to minerals, easements, or rights-of-way.⁷⁵

Special exchange of land circumstances appear under the Alaska Native Claims Settlement Act⁷⁶ and Public Law 90-171.⁷⁷ An Alaskan native village may exchange land with the Secretary of Agriculture when the village will assist in federal land management.⁷⁸ This authority apparently is given in order that NFS lands in Alaska may be consolidated after selection of lands by Alaskan native villages. When a public school authority proposes an exchange of land with the Forest Service but has insufficient land to exchange for the desired land, the "exchange" can be in fact either partially or wholly a "sale." Any money received in such a transfer must be used to acquire land in the same state for the same use as that land which was conveyed to the school authority. The exchange with a public school authority cannot exceed 80 acres.⁷⁹

4. Donations

To assure future timber supplies the Secretary of Agriculture may accept lands donated to the United States. These gifts can be accepted even

if the person making the gifts reserves rights to standing timber or minerals, if the reservation is for no longer than 20 years. A limitation has been placed on the disposition of timber from lands acquired by donation; preference must be given to purchasers who will use the products of the timber to the benefit of persons engaged in agriculture in the same state.⁸⁰

5. Disposition

The authority for disposition or conveyance of lands in the NFS is limited. Sales of lands is authorized by the Bankhead-Jones Farm Tenant Act⁸¹ and the Transfer Act of 1960.⁸² Those lands acquired under Bankhead-Jones to correct maladjustments in land use can be sold to public authorities. Only submarginal land and land not suitable for cultivation were authorized for acquisition under this Act and therefore subject to sale. The public authority receiving the land must take it subject to conditions established by the Secretary that require the land to be used for public purposes only. The Secretary must determine before any such sale that the conservation purposes of Bankhead-Jones will be preserved.⁸³

Sale of NFS lands also is authorized under the Weeks Law of 1911.⁸⁴ If some portions of the land acquired are found to be "chiefly valuable for agricultural purposes" and can be so used without harming either the forest or stream flow, they can be segregated and sold. Only actual settlers can buy these lands and only in tracts of not more than eighty acres.⁸⁵ The Secretary must find that the lands are not needed for public purposes.

NFS land in Alaska or in the eleven contiguous Western states may be sold to existing communities. The size of the sale is limited to 640 acres which must be adjacent to the community making the purchase. Before 1976 townsite sales by the Forest Service were made by subdividing the land and selling lots directly to individuals. FLPMA amendments⁸⁶ allow the sales to be made as a single transfer of the entire tract to the governmental entity. The price must be the fair market value of the land. To effect a townsite sale, the Secretary must first determine that the indigenous community objectives to be achieved outweigh the public objectives and values attainable by retention of federal ownership. Public notice of the sale must be given, and the community must show they have a need for the land. Before a conveyance can be finalized, the community must adopt an ordinance giving it control over the land to enable it to maintain only uses which do not interfere with the protection, development, and management of the NFS lands.

The Alaska Native Claims Settlement Act of 1971 provided that NFS lands could be selected by native villages to satisfy their claims. Only those NFS lands that are in or adjacent to townships that include eligible native villages can be

selected, and no more than 69,120 acres can be selected by one native village. Conveyances to the villages will be conditioned so that the practices based on sustained-yield principles will be continued for twelve years, and timber production will be governed by Forest Service rules and regulations for five years.⁸⁷

NOTES

¹16 U.S.C. § 471 (1976).

²16 *Id.* at § 475.

³34 Stat. 1271 (Mar. 4, 1907).

⁴Pub. L. No. 94-579, 90 Stat. 2743, § 704(a) (Oct. 21, 1976).

⁵236 U.S. 459 (1915).

⁶*Id.* at 471.

⁷Pub. L. No. 94-579, 90 Stat. 2743, § 704(a) (Oct. 21, 1976).

⁸43 U.S.C. §§ 1701-82 (1976).

⁹*Id.* at § 1714(d).

¹⁰*Id.* at § 1702(j).

¹¹*Id.* at § 1714(l). The review procedure also does not apply to wilderness, primitive, or national recreation areas.

¹²43 U.S.C. §§ 1714(e), (h), & (i) (1976).

¹³*Id.* at § 1714(d).

¹⁴*Id.* at § 1701(j).

¹⁵*Id.* at § 1714(d).

¹⁶*Id.* at § 1714(c)(1). The details to be included in the report to Congress are set forth in 43 U.S.C. § 1714(c)(2) (1976). In general it must include the purposes, potential effects, alternatives, and extent of the withdrawal. It also must include a report prepared by a qualified mining engineer or geologist which includes information on the land's geology, mining history and production, and an evaluation of mineral potential. This last requirement is an indication that Congress expects the purpose of many withdrawals will be for exploitation of minerals.

¹⁷43 U.S.C. § 1714(b)(2) (1976).

¹⁸*Id.* at § 1714(c)(1).

¹⁹*Id.* at §§ 1714(f) & (g).

²⁰*Id.* at § 1714(j).

²¹*Id.* at § 1714(k). This review must result in a report recommending the length of time that the withdrawal should be continued. The report will be forwarded to the President with recommendations for actions by the Secretary of Interior or for legislation. After the review is made and the report submitted, the Secretary of Interior may act to terminate withdrawals subject to the veto power of Congress.

²²See W. VOIGT, PUBLIC GRAZING LANDS 54 (1976).

²³16 U.S.C. § 515 (1976).

²⁴Clarke-McNary Act, 16 U.S.C. § 515 (1976).

²⁵Pub. L. No. 94-588, § 17(a)(3), 90 Stat. 2949 (Oct. 22, 1976), codified in 16 U.S.C. § 515 (1976).

²⁶16 U.S.C. § 518 (1976).

²⁷Id. at § 521b.

²⁸50 Stat. 525, § 2(a) (1937).

²⁹7 U.S.C. § 1010 (1976).

³⁰Pub. L. No. 87-703, tit. I, § 102(b); 76 Stat. 607 (Sept. 27, 1962).

³¹16 U.S.C. § 460~~l~~.4-460~~l~~.11 (1976). Except as specifically authorized by Congress, not more than 15% of the acquisitions under the LWCF can be west of the 100th meridian. 16 U.S.C. § 460~~l~~.9 (1976).

³²16 U.S.C. § 555 (1976).

³³7 U.S.C. § 428a (1976).

³⁴16 U.S.C. § 571c (1976).

³⁵Id. at § 526.

³⁶43 U.S.C. § 1715 (1976).

³⁷16 U.S.C. § 1246 (1976). Historic trails were added to the National Trails System in 1978. 16 U.S.C. §§ 1242(c) and 1244(b)(11) (Supp. III 1979).

³⁸43 U.S.C. § 1715 (1976). On condemnation procedures see 40 U.S.C. § 257 (1976).

³⁹Id. See discussion of rights-of-way, infra P. 7.

⁴⁰See Forest Service Manual 5420.16 and .17 for a listing of these authorizations.

⁴¹7 C.F.R. §§ 21.1002 and 1003 (1980).

⁴²Id. at §§ 21.1004-06.

⁴³42 U.S.C. § 4651 (1976).

⁴⁴42 U.S.C. § 4651 (1976); 7 C.F.R. § 21.1002 (1980).

⁴⁵7 C.F.R. § 21.1004 (1980).

⁴⁶Id. at § 21.108.

⁴⁷42 U.S.C. § 4653 (1976).

⁴⁸Id. at § 4654.

⁴⁹42 U.S.C. § 4621-5 (1976); 7 C.F.R. 100-700 (1980).

⁵⁰42 U.S.C. § 4622(a) (1976); 7 C.F.R. §§ 21.303-05 (1980).

⁵¹42 U.S.C. §§ 4622(a) & (c) (1976); 7 C.F.R. §§ 21.303-05 & 21.308 (1980).

⁵²7 C.F.R. § 21.307 (1980).

⁵³Id. at § 21.402.

⁵⁴42 U.S.C. § 4623 (1976); 7 C.F.R. §§ 21.503 & .504 (1980).

⁵⁵42 U.S.C. § 4624 (1976); 7 C.F.R. §§ 21.601-06 (1980).

⁵⁶42 U.S.C. § 4625 (1976); 7 C.F.R. §§ 21.801-03 (1980).

⁵⁷40 U.S.C. § 255 (1976); 16 U.S.C. § 571 (1976).

⁵⁸7 U.S.C. § 2253 (1976).

⁵⁹Id.

⁶⁰16 U.S.C. § 485 (1976).

⁶¹36 Stat. 962, ch. 186, § 7, as amended by Pub. L. No. 94-588, § 17(a)(4), 16 U.S.C. § 516 (1976).

⁶²16 U.S.C. § 555a (1976).

⁶³16 U.S.C. § 516 (1976).

⁶⁴43 U.S.C. § 1715 (1976).

⁶⁵16 U.S.C. § 555a (1976). See also 7 U.S.C. § 428a (1976) which authorizes the Department of Agriculture to acquire lands, inter alia, by exchange for the purpose of "carry[ing] out its authorized work."

⁶⁶16 U.S.C. §§ 516 & 555a (1976); and 43 U.S.C. § 171 (1976).

⁶⁷The qualification of surveyed non-mineral land only appears in § 485 which derives from the Exchange Act of 1922. Whether national forest land transferred in any exchange must be non-mineral is questionable. There is no such qualification in 16 U.S.C. §§ 516 nor 555a. And the language of § 516 is virtually identical to § 485; in both sections, exchanges can be made "when the public interests will be benefited thereby," if the land is "chiefly valuable for national purposes," and if the land acquired is within the national forest boundaries. While policy might dictate that the United States transfer only non-mineral lands, the 1976 Congressional declaration on the subject does not mandate such a limitation.

⁶⁸16 U.S.C. § 516 (1976).

⁶⁹The authority to exchange lands for general Forest Service use does not require this public notice. 16 U.S.C. § 555a (1976).

⁷⁰43 U.S.C. § 1716(a) (1976).

⁷¹Id. at § 1716(b).

⁷²43 U.S.C. § 1715 (1976) also authorizes acquisition by purchase, donation, and eminent domain.

⁷³Id.

⁷⁴Id. at § 1716 (1976).

⁷⁵16 U.S.C. §§ 486 & 518 (1976).

⁷⁶43 U.S.C. § 1600-27 (1976).

⁷⁷16 U.S.C. § 484a (1976).

⁷⁸43 U.S.C. § 1624(f) (1976).

⁷⁹16 U.S.C. § 484a (1976).

⁸⁰Id. at § 569.

⁸¹7 U.S.C. § 1011(c) (1976).

⁸²16 U.S.C. § 519 (1976).

⁸³7 U.S.C. § 1010 (1976) states the purpose of the Act to be the control of soil erosion, reforestation, preserving natural resources, protecting fish and wildlife, mitigating floods, preventing impairment of dams and reservoirs, conserving surface and sub-surface moisture, protecting the watersheds of navigable streams, and protecting the public lands, health, safety, and welfare.

⁸⁴36 Stat. 962, c. 186 (March 1, 1911). This Act authorized acquisition of forested, cut-over or denuded lands within the watersheds of navigable streams if that land was deemed necessary for regulation of stream flow or for timber production. The sales discussed here only apply to those lands which were acquired under this authorization.

⁸⁵16 U.S.C. § 519 (1976). Jurisdiction over these lands reverts to the state of their location upon their sale.

⁸⁶16 U.S.C. § 478a (1976). No specific criteria is set out by the statute. But an analogous situation, acquisition of land by the United States, is covered by regulations, 7 C.F.R. § 21.100. See also 42 U.S.C. § 4651, Uniform Relocation Assistance and Real Property Acquisition.

⁸⁷43 U.S.C. § 1600.27 (1976).

B. SPECIAL USES AND RIGHTS-OF-WAY*

By federal statute no person is to be prohibited from entering forest reservations "for all proper and lawful purposes," including prospecting, locating, and developing mineral resources when the rules and regulations covering such reservations are complied with.¹ If the persons are actual settlers residing within the boundaries of forest reservations, they cannot be prohibited from ingress or egress or from crossing reservations to and from their homes or property. The term "actual settlers" has been strictly construed.² The Forest Service must allow such settlers to maintain schools and churches and to occupy any part of the forest reservation for that purpose. There is a limit of two acres for each schoolhouse and one acre for a church.³ Also, the Secretary of Agriculture must permit the construction of road and other improvements as may be necessary for these actual settlers to reach their homes and utilize their property, under such rules and regulations as the Secretary may prescribe.⁴

The Secretary of Agriculture is vested with broad authority to allow prospecting, development, and utilization of mineral resources on lands acquired.⁵ Under regulations prescribed by him, the Secretary may permit the use of timber and stone found upon forest reservations, free of charge, by bona fide settlers, miners, residents, and prospectors. The use of these materials must be for firewood, fencing, buildings, mining, prospecting, and other domestic purposes as may be needed.⁶ Also, all waters on forest reservations may be used for domestic, mining, milling, or irrigation purposes. Such use must comply with the laws of the state in which the reservation is

situated or under the laws of the United States and its rules and regulations.⁷

Special uses and rights-of-way on NFS lands are governed by amended section 497 of the 1897 Organic Act⁸ and the former section 551 as modified and repealed in part by FLPMA.⁹ Many of the purposes for which permits have been issued in the past will now come under the right-of-way provisions of FLPMA. Special use permits will still be available for industrial, commercial, or recreational purposes under section 497. That section imposes limitations on both the area of land and the duration of the permit granted. The special use cannot involve more than 80 acres nor exceed 30 years. In addition, the permits are subject to terms and conditions imposed by the Forest Service. Special use permits typically are of short duration and usually are subject to revocation for emergencies or if their conditions are breached. Another condition requires the use be conducted with maximum environmental protection and the payment of fees commensurate with the use granted. Permits also may be subject to other necessary and reasonable conditions determined by the land manager.¹⁰

Special use permits serve several functions. They are the basis for ski resort areas and commercial activities such as motels, stores, ski schools, and other services on NFS land. They also may allow activities not directly related to resource development. For example, activities ancillary to mining or timbering may be done under a special use permit for land adjacent to the work area. Those activities could include housing, saw mills, waste disposal, or other activities necessary to development of the resource.

Some courts have considered the discretionary authority of the Forest Service under § 497 fairly broadly. Under the Administrative Procedure Act matters "committed to agency discretion" are not subject to judicial review. In Ness Investment Corp. v. USDA Forest Service¹¹ the plaintiff argued that the determination of who is qualified to receive a special use permit to build a recreational facility is not committed to the Forest Service discretion under law within the exception to the APA. The court disagreed. It concluded that the statutory language, "is authorized," is not mandatory and hence is within the discretion of the agency. Thus according to the court, the Forest Service had the discretion to grant or deny special use permits for the construction of recreational facilities on NFS land. The court also noted that agency expertise and knowledge is essential to determining an appropriate grant of a special use permit. These are day-to-day decisions routinely made by Forest Service personnel and properly within their determination.

The court held that the grant or denial of a special use permit was not subject to judicial review because no standard existed to apply to determine the appropriateness of the agency's

*The notes for Part B begin on p. 10.

decision. It also concluded that Congress intended the agency's action to be within the discretion of the agency as a matter of law. The court did hold, however, that the Forest Service's receiving and handling of a special use application was reviewable to determine that it was done in conformity with law. In Ness the application had been received and handled properly.

The regulation of ski instruction schools on NFS land has recently been litigated by disappointed applicants. In Heath v. Aspen Skiing Corp.¹² an independent ski instructor challenged the Forest Service regulations which limited ski resort areas to one ski school and required other conditions, including reporting gross receipts and a percentage payment of those receipts to the Forest Service under the permit. The plaintiff also challenged the Forest Service regulations as creating a legal monopoly.

The Heath court rejected both of these arguments. It concluded that under sections 497 and 551 the Forest Service had the authority to regulate and control the occupancy and use of NFS lands. The court concluded that the Forest Service regulations for ski resort areas, including ski schools, were reasonable and valid. Because use of public lands was regulated by statute, the plaintiff did not have the right to unlicensed use of those lands. Because the defendant's use of the lands was pursuant to a valid special use permit and regulations, the plaintiffs did not establish a monopoly or a conspiracy to monopolize on the part of the defendant. The court concluded that the defendant properly excluded plaintiff from operating an independent ski school without the permission of the permittee or another special use permit from the Forest Service.

The Ninth Circuit Court of Appeals, in a case subsequent to Heath, reached a contrary result concerning the reviewability of the Forest Service's denial of a ski instruction permit. Sabin v. Butz¹³ involved similar fact allegations to Heath. In Sabin plaintiff had been denied permission to operate a ski school on a ski area which was under a permit to another party without the party's consent. The court initially rejected as insubstantial a claim based on First Amendment rights. However, the court disagreed with the Heath court and the district court in Sabin concerning judicial review of the administrative action denying the permit. The Ninth Circuit stated that there is a basic presumption of judicial review of agency action that also applies to the issuance or denial of special use permits. The court concluded that the language limiting the exercise of the permit authority provided "law to apply" and allowed review under the APA's arbitrary and capricious standard. The specific language of limitation was that the permit authority "shall be exercised in such manner as not to preclude the general public from full enjoyment of the natural, scenic, recreational, and other aspects of the national forest." Whether the denial in fact violated this language was for the court to determine as a matter of law.

The court next considered whether the single permittee policy and denial of the permit were within the authority of the Secretary. The court concluded the single permittee policy was within the statutory authority which was broad enough to include the single permittee policy. However, the court decided that the permit denial may have been arbitrary and capricious. The court concluded that the agency's single permittee policy could be anti-competitive, exclusive, and monopolistic. It held that the Forest Service did not justify properly its reasons for the single permittee policy. Hence the case had to be remanded for further fact development to establish the Forest Service justification for the single permittee policy. Specifically, the court said that it was arbitrary and capricious to establish that policy without considering all relevant factors, here the monopolistic and related anti-competitive factors and the loss of benefits to the public in a single-permit policy.

The special use permit can serve other functions for its holder. In Jette v. Bergland¹⁴ owners of NFS lands sought to stop exploratory mineral activities by Exxon under a special use permit. Exxon argued that the action was in accordance with the special use permit and was thus legal and not violative of any rights of the plaintiff. The plaintiff argued that the grant of the permit and the actions taken under it were a major federal action significantly affecting the quality of the human environment and, as such, they required an environmental impact statement (EIS) which had not been prepared. The Forest Service had issued special use permits to Exxon to construct access roads to the mining claims in 1972 and again in 1973. Subsequently new mining regulations were issued by USDA, and an operating plan was prepared as a prerequisite to operations by Exxon. The Forest Service prepared an environmental analysis report and concluded that an EIS was not necessary. The existing special use permits were cancelled, and the operating plan went into effect until 1976, which plan was later extended until the end of 1977.

The court concluded that an EIS was required, notwithstanding the late date. It held that the Forest Service was hiding preparation of an EIS behind its environmental analysis report, which added to the volume of paperwork but did not adequately consider the magnitude of the operation according to the standards set by NEPA. The case was remanded for the Forest Service to make an appropriate determination of whether an EIS was necessary.

More recently the courts have upheld the Forest Service authority under FLPMA to regulate grazing permits on NFS land. In Perkins v. Bergland¹⁵ the issue was whether the grazing permit authority of the Forest Service was "agency action committed to agency discretion by law" and hence excepted from judicial review under the APA. The court first concluded that the grazing authority under section 551 on NFS lands was discretionary. It held that there was no judicially cognizable

standard to govern the exercise of agency discretion regulating cattle grazing on national forest lands.

In Bergland the Secretary had reduced the allowable use for two permittees which they argued was a suspension or revocation of their permits. The court concluded that this was not a suspension or revocation of a permit which would be subject to review because under Forest Service regulations the discretion to suspend or revoke is limited. The court concluded that the power of reduction is implicit in the rules and regulations and expressly provided for in the grazing permit. Hence it is discretionary and not subject to judicial review. The court cited two earlier cases which had held that proper allocation for grazing purposes or matters was subject to the expertise of the Forest Service and not subject to review by courts.

A similar result was reached by the court in Nelson v. Kleppe.¹⁶ Although the issue in Nelson was classification of land under the Desert Land Act by the Interior Secretary, the court held that the decision to classify lands was one committed to the agency's discretion by law. Hence it was not reviewable under the APA.

FLPMA imposes a number of requirements relating to rights-of-way that are designed to insure environmental protection; those requirements are in addition to any other measures that might be necessary in the granting of a right-of-way, such as preparation of an EIS. To minimize adverse environmental impacts, the Secretary is required to the extent practical to confine multiple rights-of-way to common corridors.¹⁷ Moreover, rights-of-way are to be limited to the ground the Secretary determines necessary for the project and which "will do no unnecessary damage to the environment."¹⁸ Each right-of-way must contain such conditions as will minimize damage to the environment and require compliance with any applicable air and water quality standards as well as any state standards more stringent than federal for public health and environmental protection.¹⁹ Other conditions as the Secretary deems necessary are to be included to protect the public interest in the lands traversed by, or adjacent to, the right-of-way and to require location of the right-of-way along a route that will cause the least damage to the environment, taking into consideration feasibility and other relevant factors.²⁰

Before granting or renewing any right-of-way, the Secretary may require any information from the applicant that is reasonably related to a determination of whether it should be granted or on what conditions.²¹ In case a right-of-way for any new project "may have a significant impact on the environment," however, the Secretary must require the applicant to submit a plan of construction, operation, and rehabilitation for the right-of-way that will comply with any stipulations or regulations issued by the Secretary, including the conditions that are required to be contained in the right-of-way under the Act.²²

Aside from the requirements of FLPMA designed to protect the public interest, the Secretary has rather wide latitude in determining whether a right-of-way will be granted and, if so, what the extent, duration, and other conditions of the right-of-way will be. The law requires that the term of the right-of-way be reasonable in light of all circumstances, including the cost of the facility, its useful life, and any public purposes it serves. Temporary use of additional lands as reasonably necessary may be authorized.

The Secretary may require a bond or other satisfactory security to secure compliance with the conditions of the right-of-way or any rules adopted by the Forest Service. The Secretary also may decline to grant a right-of-way unless the applicant has satisfactory technical and financial capability to construct the project for which the right-of-way is requested. The Secretary may convey land covered by a right-of-way either subject to the right-of-way or may reserve to the United States that portion lying within the boundaries of the right-of-way.²³

With the consent of the holder, the Secretary may cancel any existing right-of-way and issue another in its stead.²⁴ If a new right-of-way is granted in connection with realignment of a railroad, the same terms and conditions as in the old right-of-way as to rental, duration, and nature of interest may be provided if the Secretary finds it in the public interest and the lands are not within an incorporated community and are of approximately equal value.²⁵

The fee for a right-of-way is mandated as the fair market value which is to be paid annually in advance. But if the fee is less than \$100 annually, more than one year's payment at a time may be required. Rentals may be waived when a right-of-way is in reciprocation for a right-of-way conveyed to the United States in connection with a cooperative cost share program between the United States and the holder. The Secretary may require reimbursement of all reasonable costs for processing an application and inspecting and monitoring the construction, operation, and termination of the facility, but the Secretary need not do so when there is a cooperative cost-share right-of-way program between the United States and the holder. A right-of-way that cannot be assigned without the consent of the Secretary may be granted at no charge or at an equitable charge in the public interest less than fair market value to any governmental agency, nonprofit organization, a holder providing a valuable public benefit without or at a reduced charge, or a holder in connection with an authorized land use for which compensation is already being paid.²⁶ A right-of-way may be suspended or terminated after due notice to the holder and, in the case of easements, after an appropriate administrative proceeding, if the right-of-way has been abandoned or any provision of the law, condition, or rule relating to the right-of-way has been violated. Failure to use a right-of-way for any continuous five-year period creates a rebuttable presumption of abandonment.²⁷

The Secretary is directed by FLPMA to issue regulations implementing the statutory provisions concerning rights-of-way, including regulations that specify the extent to which a holder will be liable to the United States for damages or indemnity in the case of claims arising out of use and occupancy of the right-of-way.²⁸ FLPMA mandates other regulations to govern the terms that are to be included in rights-of-way and the criteria and procedures to be used in designating corridors for multiple rights-of-way.²⁹

Thus the authority of the Forest Service to grant special use permits or rights-of-way is broad under the applicable statutes but there are definite limits on that authority. Depending on the use to which the land will be put or the nature of the rights-of-way, an EIS may be required in granting or denying a special use permit or application for a right-of-way. The new provisions of FLPMA concerning rights-of-way impose more stringent requirements than existed under prior law particularly with reference to environmental protection. The rules and regulations concerning use and occupancy of NFS lands must be reasonable and are subject to judicial review. Similarly, the procedures for processing and receiving an application for land use must be followed by the agency, and, if they are not, they will be subject to judicial review, too.

NOTES

¹16 U.S.C. § 478 (1976).

²42 Op. Att'y Gen. 7 (1962). The Attorney General said that the term did not mean timber owning corporation. Also, the actual settler's right to egress and ingress was to existing roads only. Permission to build new roads is conditioned on the rules and regulations put out by the Secretary of Agriculture. These conditions apply to actual settlers and other land owners within the forest.

³16 U.S.C. § 479 (1976).

⁴In other areas the Forest Service may furnish meals, lodging, bedding, fuel, and other services to people attending Forest Service Demonstrations and users of Forest Service resources and recreational facilities. The rates of these services must reflect the cost. The money received must be paid back to the particular appropriations fund. 16 U.S.C. § 580(e) (1976). The Forest Service may also permit the use by anyone of structures and improvements of any NFS land. The use will be for periods of up to 30 years and at discretionary rates. The permittees may be required to recondition and maintain these structures as well. 16 U.S.C. § 580(d) (1976).

⁵16 U.S.C. § 520 (1976).

⁶Id. at § 477.

⁷Id. at § 481.

⁸Id. at § 497.

⁹Pub. L. No. 94-579, tit. VII, § 706(a), 90 Stat. 2793 (Oct. 21, 1976).

¹⁰See 36 C.F.R. § 215.1 (1980).

¹¹512 F.2d 706 (9th Cir. 1975).

¹²325 F. Supp. 223 (D. Colo. 1971).

¹³515 F.2d 1061 (10th Cir. 1975).

¹⁴579 F.2d 59 (10th Cir. 1978).

¹⁵455 F. Supp. 937 (D. Ariz. 1978).

¹⁶457 F. Supp. 5 (D. Idaho 1976).

¹⁷43 U.S.C. § 1763 (1976).

¹⁸Id. at § 1764(a).

¹⁹Id. at § 1765(a).

²⁰Id. at § 1765(b).

²¹Id. at § 1761(b)(1). If deemed relevant to his determination whether a business entity should have a right-of-way, the Secretary must require disclosure of the identity of the participants and significant shareholders in the entity. Id. at § 1761(b)(2).

²²43 U.S.C. § 1764(d) (1976).

²³Id. at § 1768.

²⁴Id. at § 1769(a).

²⁵Id. at § 1769(b).

²⁶Id. at § 1764(g).

²⁷Id. at § 1766.

²⁸Id. at § 1764(h)(1). The Act requires any regulation or stipulation that imposes liability without fault to limit damages commensurately with the foreseeable hazards; liability in excess of that is to be determined by ordinary rules of negligence.

²⁹43 U.S.C. § 1763 (1976).

C. TRANSPORTATION SYSTEMS*

An integral part of any forest plan must be a coordinated transportation system designed to implement the land use alternatives contained in the forest plan. The major legislative directives dealing with the transportation system in the national forests began with the National Road and Trails System Act of 1964.¹ The 1964 Act was brought about by several different influences.

As of June 3, 1962, the Forest Service administered approximately 186 million acres of land.² Of that total, 160 million acres were land withdrawn from the public domain. Within the exterior boundaries of the NFS there were some 38 million acres of land in private ownership.³ Owners of these lands were regarded as having statutory assurance of ingress and egress to and from their lands by reason of the provision of the Act of June 4, 1897. This statutory assurance was necessary since the Secretary of Agriculture lacked any authority to grant easements across NFS lands.⁴

* The notes for Part C begin on p. 18.

The transportation issue surfaced after an Attorney General's opinion of February 1, 1962.⁵ The Attorney General held that the 1897 Act was:

no barrier to the Secretary's conditioning--the grant of a right to use existing or to construct new roads on national forest lands on the grant by the applicant of a reciprocal right to the United States.⁶

Previous grants were not conditioned because private owners were believed to possess a statutory right of ingress and egress. Following the Attorney General's opinion, the Forest Service drafted regulations governing the granting of the access rights across the national forests.⁷

But both before and after February, 1962, the Forest Service was experiencing problems in seeking rights to use existing roads, especially those built at private expense on private lands. The most significant barrier to the entering of voluntary exchanges of rights-of-way between the private landowners and the Forest Service was the inability of the Forest Service, through the Secretary of Agriculture, to grant permanent easements.⁸ The private landowners wanted permanent access rights from the Forest Service, particularly when they were asked to cede such rights to the United States. This situation created the need for the legislation to improve access and transportation to and through national forests.

The stated congressional purpose of the 1964 Act was to develop a system of roads and trails over national forest and related lands in order to enhance the value of adjacent lands and to permit more intensive use of national forest and related lands as well as the providing of protection, development, and management of those lands consistent with multiple-use and sustained-yield principles. The 1964 Act attempted to resolve some of these transportation problems by specifically authorizing the Secretary of Agriculture to grant permanent or temporary easements for highway rights-of-way over all lands administered by the Forest Service.⁹ The statute also provides the methods by which easements are to be terminated.¹⁰ These methods include termination by consent, by condemnation, or by nonuse over a 5-year period. In the case of termination by nonuse the Secretary must notify the owner of the easement, and a hearing pursuant to the requirements of Forest Service regulations must be held prior to the Secretary's final order.¹¹

Forest Service regulations spell out how private parties are to acquire access rights over NFS lands.¹² Applications for permanent or temporary right-of-way easements over NFS lands or roads will be approved by the Chief of the Forest Service for those applicants which have provided appropriate easements to the United States over their privately owned lands and who have con-

structed their proportionate share of the road.¹³ The Chief after the granting of the easement must enter the documents in the records of the Forest Service and deliver a copy to the applicant.¹⁴ In addition, the Chief is authorized to grant a permanent or temporary easement upon such exchange or share-cost arrangements as the Chief may deem appropriate.¹⁵ The Chief also is authorized to grant easements to state or local governments with appropriate conditions for said state or local government agencies to maintain the road.¹⁶ All instruments that affect permanent interests in the land must be recorded in each county in which the lands are located.¹⁷ Copies of all instruments affecting lands reserved from the public domain shall be furnished by the Chief to the Secretary of Interior.¹⁸

Although the 1964 Act did not require it, the pre-NFMA regulations required the development of a forest development transportation plan for each national forest.¹⁹ The 1964 Act did, however, prescribe four methods of financing the development of forest development roads.²⁰ These were: (1) use of appropriated funds; (2) requiring timber purchases to amortize road costs in their contracts; (3) use of cooperative financing with other governmental and private bodies, and (4) any combination of the first three.²¹ The statute also specifically prohibits the Secretary from imposing road costs on timber producers where the roads have to be constructed to a higher standard than needed solely for timber production purposes.

The regulations require that all roads financed by the use of a cooperative agreement be done so in accordance with procedures adopted by the Chief.²² Cooperative funds contributed in advance of expenditure must be deposited in the Forest Service Cooperative Fund.²³

The 1964 Act also authorized the Secretary to require users of a road to maintain or reconstruct a road or deposit sufficient monies with the Secretary to achieve that goal.²⁴ The maintenance or reconstruction of forest roads has to be in a proportionate ratio to each user's actual use of the road.²⁵ Any unused portions of these maintenance deposits must be transferred to miscellaneous receipts or refunded to the depositor.²⁶

The 1964 Act remained intact until Congress began investigating the methods of forest road financing in 1974. This led to changes being made in 1974, with further changes added in 1976.

Section 8 as now enacted of the National Forest Management Act of 1976 (NFMA)²⁷ was originally section 10 of the Forest and Rangeland Renewable Resources Planning Act of 1974.²⁸ It was enacted as a result of congressional studies into the methods of forest road construction financing and their impact on the level of profits resulting from timber sales.²⁹ The Senate Committee on Agriculture and Forestry noted that the two major methods of financing forest roads as described in the 1964 Act were direct appropriations and timber

purchasing financing, a method which involved the reduction in the value of timber by the "estimated cost" of the road built by the timber purchasers to harvest and transport the timber.³⁰

The Committee found that the timber purchaser method resulted in several inherent shortcomings. They referred to the method as "backdoor spending" in that it was not subject to budgetary control. This "backdoor spending" authority was unique in that it permitted the Forest Service to reduce the value of the timber in order to induce the timber purchaser to build the road needed to harvest the timber. This was the only Forest Service program in which the agency was given the authority to "appropriate" revenue without any congressional control or any standard prescribed by law as to when and how the method could be done. Under the timber purchaser method, neither the Forest Service nor the timber purchaser was held accountable for the use of this financing method.

The Committee noted the increasing preference of timber purchaser financing over the use of direct appropriations to construct forest roads. It also recognized that the Forest Service had failed to use authorized road funds but had instead relied heavily on the timber purchaser method. For this reason the Committee sponsored section 10 of the Forest and Rangeland Renewable Resources Planning Act (RPA) designed to increase the use of appropriated funds, and "to discourage the practice of asking for inadequate appropriations with the idea of relying on purchasers for road construction."³¹ The section stated that, "if for any fiscal year the budget request for forest development roads and trails (including the 10 percent of forest receipts available under 16 U.S.C. § 501) is less than the amount authorized therefor, or if any portion of the appropriation for that purpose is impounded, the amount of construction financed by forest product purchasers under 16 U.S.C. § 535(2) would have to be reduced below the preceding fiscal year by an equal amount."³² The key reform provision in this section was to provide that, in the budgetary process, the entire road program would be considered as a single entity.

During the later consideration of the NFMA in 1976, the Senate Committee on Agriculture and Forestry again undertook a study of the national forest transportation system, finding that it was critical to the management of NFS lands. The Committee was especially concerned with the financing mechanism used for constructing the transportation system.³³ For this reason the Committee again reviewed the national forest transportation system as it was being administered. The Committee made several findings concerning the inadequacies of the transportation system and its adverse effect on the ecology of the NFS lands.

The Committee again noted the shortcomings of the timber purchaser method of financing roads and perceived two distinct problems created by using this method of road financing. The purchaser was

required to make an initial outlay of capital to build the road. Also, the decreased profit from timber sales resulted in decreased revenue-sharing between the federal government and the state and counties in which the national forest was located.

The Committee noted the major trend in forest road construction away from direct appropriations to timber purchaser financing. In the twelve years between the 1964 Act and the 1976 Committee hearings, the dramatic impact of the timber purchaser method of financing roads on the amount of revenue received from the sale of timber was noted. In addition, by 1976 the originally contemplated 50-50 balance of direct appropriations to timber purchaser financing had been altered to a 5-95 ratio.

The 1964 Act required the timber purchaser to build a road, the standard of which being no higher than needed to harvest and transport timber from the particular area. The Committee found this language "unfortunate" because in essence the harvested timber was required to bear the cost of the roads.³⁴

The Committee stated several goals to be reached through the passage of section 8 of NFMA. The roads had to be well-planned and carefully designed for intended uses. The management plans and transportation plan had to be integrated documents assuring that permanent roads and temporary roads would be built as needed. The Committee also expressed a concern for both the on-site and off-site impact of the roads on the soil, water, and renewable resources.

With these concerns in mind the Committee adopted several changes in the forest transportation system. Section 10 of the RPA was incorporated into section 8 of the NFMA as subsection a. Section 8, with the 1964 Act, was to be implemented according to several requirements and guidelines set forth by the Committee.

1. Road funding devices will be evenly considered since there will no longer be a presumed advantage to favoring a system with fiscal impacts disadvantageous to local governments.

2. Road network decisions will be based on long-term needs. Multiple-use roads will be planned for a sustained yield of multiple resources.

3. Road standards will be better tailored to intended uses, considering safety, cost of transportation, and impacts on lands and resources.

4. Timber purchasers who have been tying up working capital in excess of \$200 million annually will no longer be expected to build major roads as a condition of purchasing timber. The issue has not been whether they are or are not compensated for building such roads. Timber purchasers are compensated. The issue is whether this system of timber

revenue reduction to finance road construction should be relied on so heavily and used so indiscriminately.

5. Timber purchasers will be expected to construct only those roads, permanent and temporary, where such roads are the best available alternative.

6. The network of needed roads will be planned and well executed, using non-permanent and permanent roads, as appropriate. Non-permanent roads and roadways will be designed to the extent feasible for early return to the resource production base.

7. The impact of roads and roadways as contributors to erosion, soil, and watershed losses should be a stronger factor in design, location and construction of roads.³⁵

In addition, the Committee found that inappropriate road standards constituted a waste of either type of road funding and created an adverse effect on the forest environment. Also, timber purchaser financing which required that the purchaser bear only the cost of the road necessary for harvesting and transporting timber produced roads which were unfit for future utilization because of their low standards. Later reconstruction of the roads required additional funds and also adversely affected the surrounding environment. For this reason the Committee stated that prescribing road standards was a responsibility of the Secretary of Agriculture and constituted a part of his management responsibilities for the national forests.

One of the additions of the 1976 Amendment was that roads constructed on NFS lands shall be designed to standards appropriate for the intended uses, considering safety, cost of transportation, and impact on land and resources.³⁶ This implies a required coordination of the transportation and integrated forest plan.

The method of financing road construction and maintenance should enhance local, regional, and national benefits, except that the financing of roads as authorized by the 1964 Act³⁷ shall be deemed "budget authority" and "budget outlays" and shall be effective for any fiscal year only in the manner required by 31 U.S.C. § 1351(a).³⁸ The term "budget outlays" means, with respect to any fiscal year, expenditures and net lending of funds under budget authority during each year. The term "budget authority" means authority provided by law to enter into obligations which will result in immediate or future outlays involving government funds.³⁹

The 1976 changes also require that all road construction in connection with a timber contract or other lease are to be temporary unless a permanent road is set forth in the relevant road system plan.⁴⁰ Therefore, all roads are to be designed so that vegetative cover may be reestablished within ten years after its use.

In addition to the statutory provisions just discussed, the Forest Service is also responsible for implementing and adhering to its own promulgated regulations regarding transportation planning. The regulations require that, in allocating funds to construct and maintain the transportation system, the existing transportation facilities, value of timber or other resources served, relative fire danger, and comparative difficulties of construction must be considered.⁴¹ As written these four factors would seem to be the most weighty in the budget allocation process, and other factors must be given less consideration. There is an obvious need to coordinate the allocation of funds for the transportation system with the land management plans that are being developed. The interrelationships between land use and transportation are such that, unless planning and management of both are coordinated, the objectives of each will be frustrated.

The regulations also require that a "program of work" be done on the forest development transportation system for each fiscal year in accordance with procedures prescribed by the Chief.⁴² This program should also be coordinated with the land management plan.

The regulations specify that construction and maintenance work on any forest development transportation facility using appropriated funds must be "necessary and economically justified for protection, administration, development, and multiple-use management. . . ."⁴³ Again, this work should be coordinated with the land management plan for the forest. Preliminary engineering and construction and maintenance efforts must be performed by "base account" or let to contract unless specifically approved by the Chief.⁴⁴ No work can be done on transportation facilities unless the necessary rights-of-way have been secured and approved by the Attorney-General.⁴⁵

Road system management is also governed by regulation.⁴⁶ Traffic on roads is governed by state traffic laws unless they are in conflict with any particular rules adopted for a national forest following the procedures set forth in 36 C.F.R. 261.⁴⁷ Roads and/or trails may be closed to certain types of vehicles as determined by the Chief, a Regional Forester, or a Forest Supervisor.⁴⁸

The regulations also create a policy that whenever feasible the Chief shall obtain the needed access from private landowners and cede access to private landowners to fully utilize the resources of the intermingled NFS and private lands.⁴⁹ Actual settlers residing within the NFS must be permitted ingress and egress in order to utilize their property, as long as they adhere to the rules and regulations regarding the protection and administration of the lands and roads.⁵⁰

The regulations also set out the policies for sharing costs in road construction or maintenance. Use of a road for commercial hauling will be

conditioned upon the improvement of the road by the user unless the Chief determines that the other values of the road will not have their use impaired by the commercial hauling.⁵¹ The commercial hauler can either make the improvements or deposit bonds with the Forest Service in an amount equal to the projected costs of improvement and allow the Forest Service to complete the job. The Chief is authorized to accept the following "corresponding benefits" in lieu of actual construction: (1) deposit of funds, (2) grant of a reasonable right of use of substantially the same value, (3) construction or maintenance of another Forest Service road, or (4) any combination of the first three.⁵²

Forest development roads that are part of a state or local road system may be constructed or maintained by the Forest Service if an agreement pursuant to 23 U.S.C. § 205 has been executed and such road is essential to the safe and economical access to NFS lands.⁵³

Finally the Chief is authorized to construct or maintain any forest development roads that will permit maximum economy in timber harvesting while simultaneously protecting and managing the land for another resource use.⁵⁴ Timber purchasers cannot be required to improve roads beyond that level needed in the harvesting and removal of timber.⁵⁵

Forest Service transportation planning and management insofar as they are connected with the federal-aid highway program must consider the impact of § 4(f) of the Department of Transportation Act of 1955 (DOTA).⁵⁶ In enacting DOTA, the congressional declaration of purpose included a statement of "national policy that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges and historic sites."⁵⁷ With this purpose in mind, § 4(f) was added by Senate amendment to the original House DOTA bill "to insure that in planning highways, railroad rights-of-way, airports and other transportation facilities, care will be taken, to the maximum extent possible, not to interfere with or disturb established recreational facilities and refuges."⁵⁸

The Federal-Aid Highway Act of 1966 was also amended⁵⁹ to further the "national policy of the Federal-aid highway programs to preserve Federal, State, and local parklands and historic sites and the beauty and value of such sites."⁶⁰ The language of the amendment was similar to that of DOTA § 4(f). Both DOTA § 4(f) and the Federal-Aid Highway Act § 138 were amended by the Federal-Aid Highway Act of 1968 so that the language in both is now essentially identical. For this reason, subsequent references will be made to DOTA § 4(f), although the discussion applies equally as well to § 138.

The pertinent language of DOTA § 4(f) states that:

[T]he Secretary [of Transportation] shall not approve any program or project which requires the use of any publicly owned land from a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance as determined by the Federal, State, or local officials having jurisdiction thereof, or any land from an historic site of national, State, or local significance as so determined by such officials unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreational area, wildlife and waterfowl refuge, or historic site resulting from such use.⁶¹

Pursuant to DOTA § 4(f), regulations have been promulgated concerning the use of publicly owned lands for highway purposes.⁶² Also, DOTA § 4(f) has been construed in several federal appellate decisions. Both the regulations and the judicial decisions are useful in determining what is required in Forest Service planning and management in order to comply with the mandates of DOTA § 4(f).

Unless no feasible or prudent alternatives exist, publicly owned lands determined to have federal, state, or local significance may not be used for highway purposes. When the determination is made that such alternatives do not exist, a § 4(f) statement must be prepared by the Federal Highway Administration (FHWA) Division Administrator which documents "the consideration, consultations, and alternative studies" involved in making the no feasible--no prudent alternative determination.⁶³ A second purpose of the § 4(f) statement is to "support a determination that the proposed action includes all possible planning to minimize harm."⁶⁴

If the Chief of the Forest Service determines that land required for a highway project has no significance as a park, recreation area, refuge, or historic site, a § 4(f) statement is not required. However, the FHWA Division Administrator must review this determination to be assured of its reasonableness.⁶⁵ Also, if the NFS land required for highway purposes is administered for multiple uses and is not being used as a recreation area or wildlife refuge, and no definite plan has been formulated for such use, DOTA § 4(f) does not apply and thus a § 4(f) statement is not required.⁶⁶ Again, the FHWA Division Administrator must make a determination to be assured of the reasonableness of the Forest Service assessment of the use or projected use of the land.

An important exception to the application of § 4(f) was enacted by Congress in 1978. No land situated along a designated national historic trail or the Continental Divide National Scenic Trail will be subject to § 4(f) unless such site is deemed to be of "historical significance" noting as a yardstick of significance the criteria used to designate sites for the National Register of Historic Places.⁶⁷

Under the original regulations, any FHWA projects having involvement with § 4(f) lands have to be processed as a major action requiring an EIS regardless of the magnitude or scope of the project. This requirement has been recently amended so that now every such project will not require formal documentation under NEPA.⁶⁸ Although the requirements were changed with regard to the mandates of NEPA, the amendment did not alter the requirements of § 4(f). Any § 4(f) involvement must be coordinated with the agency having jurisdiction over the § 4(f) lands, and the comments received from such agencies must be included in the § 4(f) statement.⁶⁹ In addition, public hearings are required and all § 4(f) information must be made available at these public hearings.⁷⁰

The legislative history of the 1968 amendment to § 4(f) indicates that Congress continued to recognize the importance of parks and recreation areas.⁷¹ However, they also recognized that other high priority items must be balanced against the preservation of parkland. One consideration involved the administration of the Highway Program in such a manner as to "reduce the harsh impact on people resulting from dislocation and displacement by reason of highway construction. For this reason, use of parkland properly protected and with damage minimized by the most sophisticated construction techniques is to be preferred to the movement of large numbers of people."⁷² Although Congress has recognized that community disruption may be a factor in finding that no prudent or feasible alternatives exist, accurate and detailed information is needed to support this determination. Supporting information should be included which evidence these unique problems.⁷³

Section 4(f) requires that the Forest Service makes the determination that lands under its jurisdiction have significance and thus may not be used for highways. For this reason the Forest Service should be aware of court decisions applying the language of § 4(f) to various situations. The leading decision is Citizens to Preserve Overton Park, Inc. v. Volpe.⁷⁴ The Court determined that § 4(f) prohibited the use of federal funds for the construction of highways through public parks, except under the most unusual circumstances. In making this determination, the Court rejected the city's contention that a wide ranging balancing of competing interests be taken into consideration. The Court stated that, if the value of the parkland were balanced against the cost of alternative routes, safety considerations, and community disruption, the parkland would always be used.

The Court also defined a "feasible" alternative route as one that is compatible with sound engineering. A "prudent" alternative was defined as one not presenting unique problems and without factors such that the cost or community disruption would reach extraordinary magnitude.⁷⁵

Overton Park is the basis for many decisions by courts to resolve controversies arising from the use of public land for highways constructed partly by federal funds. Several appellate decisions have been concerned with whether alternative routes may be rejected because they were not "feasible or prudent." Although an alternative site may not be eligible for construction funds supplied by local land sales, the Court found that this consideration could not be relied upon to reject an alternative site.⁷⁶ The Overton Park decision that cost was a subsidiary factor in analyzing alternative routes was extended to preferred plans of financing also being declared subsidiary. Time delays in implementing an alternative route have also been found to be an insufficient reason for the rejection of alternative routes.⁷⁷

Courts also have reviewed this determination by the official having jurisdiction that the "publicly owned land from a public park, recreation area, or wildlife and waterfowl refuge . . . [has] national, State or local significance."⁷⁸ Section 4(f) requirements have been found to apply to land that the Secretary of Interior has determined may be eligible for inclusion in the National Register, since this determination constitutes a finding that the land has historical significance.⁷⁹ Also, after the appropriate official makes the required § 4(f) determination of significance, the Secretary of Transportation is not only authorized, but is obligated to accede to the ruling that the land was not set aside for park or recreation uses.⁸⁰

Several courts have reviewed the approval given by the Secretary of Transportation in funding highway projects involving the use of parkland. The language of § 4(f) does not authorize the Secretary of Transportation to divide a highway project into segments for the purpose of giving his approval for the construction of the segments not located on parkland.⁸¹ In giving his approval for the construction of a federally funded highway that takes parkland, the Secretary of Transportation must determine that the highway "must not take parkland, unless a prudent person, concerned with the quality of the human environment, is convinced that there is no way to avoid doing so."⁸² If the parkland has been determined to be the only "feasible or prudent" route, the Secretary of Transportation has the affirmative duty to implement the necessary procedures to minimize all possible harm to the park. This duty is a condition precedent to his approval of such taking for highway purposes where federal funds are involved.⁸³

The Overton Park decision has also been the basis for judicial statements that the significance of a park cannot be based on the balance between the desirability of using the parkland as a park and as a highway. Only the value of a park as a park can be considered.⁸⁴ Also the use of the parks for highway purposes does not have to be substantial. "Any park use, regardless of its degree, invokes § 4(f)."⁸⁵

Courts have recognized that use of parkland by highways may be constructive as well as actual. Although a highway does not physically encroach on parkland, the resulting air and noise pollution and the unsightliness of the highway "dissipate its [the park land's] aesthetic value, crush its wildlife, defoliate its vegetation and 'take' it in every practical sense."⁸⁶ The statutory construction of "use" is a matter of law and should be construed broadly in favor of environmental impact. One court found that a freeway encircling a campground constituted a "use" of the campground.⁸⁷

The major requirement which § 4(f) imposes upon Forest Service planning and management is the initial determination that forestland under consideration for use in a highway project has federal, state, or local significance. Once this determination is made, § 4(f) must be complied with if the forestland is to be used in the highway project. The judicial opinions cited served as a guideline in the determination of forestland significance, and when § 4(f) does not directly mandate Forest Service planning and management, it acts to preserve the integrity of forestland which otherwise might be lost in a balancing between using forestland as a forest and forestland as a highway. Also the Forest Service must coordinate its proposed land use with the availability of road access, principally through the federal highway system.

Another important segment of the transportation system for the NFS is the legislative provision for a designated national trails system. The National Trails System Act of 1968⁸⁸ provided for the institution of a national system of recreation and scenic trails. In 1978 Amendments to the 1968 Act reinforced Congress's desire to develop a national trails system. In addition to recreation and scenic values, it added historical ones as purpose for which national trails may be created. The 1978 Amendments expanded the 1968 Act's system to include an historic trail component.⁸⁹

Congress, in 1968, recognized the value of providing national trails to meet a multitude of outdoor recreation uses. According to Congress the trails program would provide inexpensive recreation opportunities for increasing numbers of people seeking to enjoy outdoor activities.⁹⁰ A study showed that the number of persons walking for pleasure would increase more than 350 percent by the turn of the century.⁹¹ Hiking would be even more popular, and bicycle and horseback riding would increase almost as dramatically.

The statute now creates four different types of trails: (1) recreation, (2) scenic, (3) historic, and (4) connecting or side.⁹² National scenic and historic trails can be designated only by Congress.⁹³ National recreation trails may be established and designated by the Secretary of Agriculture where the trail is over lands administered by him.⁹⁴ In addition, the Secretary of Agriculture can designate national recreation trails with the consent of the agencies having

jurisdiction over the lands upon which the recreation trail is located.⁹⁵

The first of the three designated scenic trails is the Appalachian National Scenic Trail, primarily administered by the National Park Service and the Secretary of Interior, but in consultation with the Secretary of Agriculture. The second is the Pacific Crest National Scenic Trail, primarily administered by the Forest Service, which must have the map of the trail on public display. There must be consultation between the Secretary of Agriculture and the Secretary of Interior on the administration of the trail. The third is the Continental Divide National Scenic Trail (created in 1978). The Chief of the Forest Service is to have the map of this trail in his office for public display. The Secretary of Agriculture in consultation with the Secretary of Interior is to administer the Continental Divide National Scenic Trail, and each respective Secretary is to adopt regulations designating segments of the trail open to motorized vehicles.⁹⁶ The four designated historic trails are all administered by the Secretary of Interior and the National Park Service.⁹⁷

The Secretary of Agriculture and the Secretary of Interior after consulting with appropriate governmental and private organizations must establish a uniform marker for the national trails system.⁹⁸

The Secretary of Agriculture and the Forest Service, where NFS lands are involved, are to make studies concerning the desirability and feasibility of designating other trails as national scenic trails. These studies are the basis for periodic proposals made to Congress and the President. Such proposals must be accompanied by a report which must contain the following information: (a) proposed route (including maps and illustrations); (b) adjacent areas to be utilized for scenic, historic, natural, cultural, or developmental purposes; (c) characteristics which make it worthy of designation (including a recommendation from the National Park Advisory Board for National Historic Trails); (d) current status of land ownership and current and potential land use; (e) estimated acquisition costs, if any; (f) plans and costs of maintenance and development; (g) proposed federal administering agency; (h) extent of state, local, and private participation; (i) relative uses of the lands involved, including the number of anticipated visitor-days, number of months which such trail shall be open for recreation purposes, economic and social benefits which might accrue from alternate land uses, and the estimated man-years of civilian employment and expenditures expected for maintenance, supervision, and regulation of the trail; (j) anticipated impact of public use on historical or archeological uses; (k) three additional criteria which must be met for national historic trails; and (l) the national significance and significant historical value of any trail established by historic use.⁹⁹

The 1968 Act specified 14 trails to be studied of which four were selected for inclusion by the 1978 Act.¹⁰⁰ The 1978 Act added nine more trails to study including at least two with significant segments going through national forests.¹⁰¹

The 1978 Act requires the administering Secretary of any newly designated trail to establish an advisory council within one year of the designation of said trail.¹⁰² For the Pacific Crest Trail the Secretary of Agriculture is to name an advisory council by February 7, 1979.¹⁰³ The appropriate Secretaries must consult with the advisory council over such matters as selection of rights-of-way, standards for trail markers, and general administration of the trail. The councils shall have no more than 35 members and shall be appointed by the appropriate Secretary to meet the following guidelines: (a) one representative from each federal department or agency administering lands over which the trail route passes, (b) one member from each state, to be selected from a list sent by the governors, (c) one or more members representing corporate and individual landowners and landusers, and (d) one chairman to be selected by the Secretary.¹⁰⁴

Within two years from either the date of the 1978 Act or the designation of a new national scenic trail, with an exception for the Continental Divide National Scenic Trail, the administering Secretary shall submit to the House Committee on Interior and Insular Affairs and the Senate Committee on Energy and Natural Resources a comprehensive plan for the "acquisition, management, development and use" of the trail.¹⁰⁵ These reports must be accomplished after full consultation with affected federal land managing agencies, the governors of the affected states, and the advisory council.¹⁰⁶ The report must include as a minimum, specific management objectives and practices, identification of significant trail resources, an acquisition or protection plan on a fiscal year basis, and general and site-specific development plans with anticipated costs.¹⁰⁷

Within two fiscal years of the date of the enactment of a national historic trail or the Continental Divide National Scenic Trail, the responsible Secretary, after full consultation with other affected federal land managers, governors, and advisory councils, shall submit a report to the House Committee on Energy and Natural Resources.¹⁰⁸ This report must contain, at a minimum, management objectives and practices, identification of significant resources, planned carrying capacity, and the process to be followed pursuant to 16 U.S.C. § 1246(c) for the marking of the trail.¹⁰⁹

Connecting or side trails located within the NFS may be established, designated, or marked as segments of a national recreation, scenic, or historic trail by the Secretary of Agriculture.¹¹⁰ If no federal land acquisition is involved, the appropriate Secretary may, with the consent of state and local officers, designate land admini-

stered by interstate, state, or local agencies provided that such trails provide additional points of public access.¹¹¹

The appropriate Secretary shall select the rights-of-way for national scenic and historic trails and publish a notice of said designation in the Federal Register accompanied by appropriate maps and land descriptions.¹¹² In selecting rights-of-way the Secretary must give full consideration "to minimizing adverse effects on adjacent landowners."¹¹³ The statute requires trail management to harmonize with and complement the "multiple-use" plan for the specified area.¹¹⁴ Obviously the management of the trail should be in accordance with the integrated forest plan when formally adopted. In selecting rights-of-way the appropriate Secretary shall consult with state and local officials, private organizations, and landowners.¹¹⁵ Additionally, where rights-of-way traverse other federal land, the Secretary shall, by agreement with that federal agency, secure the appropriate right-of-way.¹¹⁶

Segments of national scenic and historic trails may be relocated by the Secretary only after publication of notice in the Federal Register accompanied by appropriate maps and land descriptions.¹¹⁷ This relocation must be with the concurrence of the head of the federal agency having jurisdiction over the land. It can only occur after the Secretary has determined that the relocation is necessary to promote a "sound land management program in accordance with established multiple-use purposes."¹¹⁸ Thus relocations should be made solely when they are consistent with the integrated forest plans which should consider trail management factors prior to their adoption. Finally, no "substantial" right-of-way relocation can be executed without congressional action.¹¹⁹

National scenic or historic trails may contain campsites, shelters, and other public facilities which will not interfere with the nature and purposes of the trail by permission of the administering Secretary.¹²⁰ The use of motorized vehicles along national scenic trails is prohibited. The use of motorized vehicles on other trails cannot conflict with prohibitions on their use in wilderness and other areas.¹²¹ The administering Secretary can promulgate regulations authorizing the use of motorized vehicles for emergencies and for the purpose of providing access to inholdings.¹²² The Forest Service will allow the use of motorized vehicles on its segments of the Pacific Crest National Scenic Trail for the above two purposes.¹²³ The regulation conflicts with an Interior regulation¹²⁴ barring all motorized vehicles from the Pacific Crest Trail but is consistent with the 1978 statutory amendments. If private lands are included in national trails by a cooperative agreement of the landowner, the above prohibition shall not preclude the owner's use of motorized vehicles on or across the trail in accordance with regulations adopted by the appropriate Secretary.¹²⁵ National historic trails which follow existing roads do not fall under the prohibition but should be marked to allow use of the trail. The 1978 Act

specifically authorizes the administering Secretary of historic trails and the Continental Divide National Scenic Trail to allow motorized vehicles by regulation if it will not substantially interfere with the nature and purposes of the trail.¹²⁶

The Secretaries of Interior and Agriculture must consult with state, local, and private organizations before adopting a uniform marker for any trail. Where the trails cross federal lands the administering Secretary shall erect these markers at approximate places under the Secretary's own guidelines or standards.¹²⁷ Where the trail crosses non-federal land the Secretary shall provide these uniform markers to the cooperating agencies and require them to post markers at appropriate sites.

Within NFS or other lands administered by the Forest Service the Chief may acquire lands for trail rights-of-way by written cooperative agreement, donation, purchase with donated or appropriated funds, or exchange.¹²⁸ The acreage limitation on purchases from private landowners contained in the 1968 Act was repealed in 1978.¹²⁹

Where lands which are included in national, scenic or historic trail rights-of-way are on non-federal property, the administering Secretary shall encourage state and local governments to enter into cooperative agreements with the private landowners to provide the necessary rights-of-way.¹³⁰ If the state or local government refuses to act, the Secretary may either directly enter into cooperative agreements with landowners or acquire property by donation, purchase, or exchange. Property should be acquired in fee in order to fulfill the purposes of the trail. If, after acquiring private property, the Secretary relocates the right-of-way, the prior owner shall be given the right of first refusal to purchase the land at the fair market price. Notice must be sent to the owner's last known address.

The Secretary of Agriculture, in exercising his discretion to exchange federal for non-federal lands for purposes of acquiring trail rights-of-way, is authorized to do so under the authority and procedure available to the Secretary regarding exchanges of NFS lands.¹³¹ This authority arises principally from the Exchange Act of 1922 as amended.¹³²

Condemnation of private land for trail rights-of-way is authorized only where the appropriate Secretary has first used all reasonable efforts to consensually acquire the land.¹³³ Only such land as is reasonably necessary to provide passage can be condemned. Land or interests in land more than on an average of 125 acres per mile shall not be condemned.¹³⁴ For national historic trails only those segments indicated by the study report or comprehensive plan as "high potential" historic sites shall be taken.¹³⁵

The administering Secretary of a national historic, recreation, or scenic trail shall develop and maintain those segments of the trail on federal

lands.¹³⁶ The Secretary shall cooperate with and encourage state, local, and private development and maintenance on non-federal lands. Where in the "public interest" an administering Secretary may enter into a cooperative agreement with a state, local, or private organization to maintain and develop trails on federal and non-federal land.¹³⁷

The administering Secretary can issue regulations governing the "use, protection, management, development and administration of trails. . . ."¹³⁸ These regulations may be promulgated only with the concurrence of the federal agency head who has jurisdiction over the lands over which the trail passes.¹³⁹ Thus, even if the Secretary of Interior is administering a trail and that trail passes over a national forest, the Chief must concur with any regulation proposed by Interior before such regulation will become effective. The same would hold true for a trail administered by the Secretary of Agriculture running through Interior land. The Secretaries of Agriculture and Interior must publish uniform regulations governing user conduct on all trails and prescribe misdemeanor civil penalties for violation of those regulations not to exceed \$500, or six months imprisonment or both.¹⁴⁰

The Secretary of Agriculture is directed to encourage state, local, and private organizations to establish trails.¹⁴¹ The Secretary of Interior is specifically directed to encourage state and local use of Land and Water Conservation Fund monies for trail purposes.¹⁴²

The Secretary of Agriculture may grant easements on rights-of-way over any segment of the national trails system, pursuant to the laws applicable to easements over national forests as long as such interests are related to the purposes for the creation of the trail.¹⁴³ All federal agencies having jurisdiction over land that is suitable for improving any national trail shall cooperate with the Secretaries of Agriculture and Interior so that the lands be made available for such use.¹⁴⁴

Finally Congress provided that no funds may be expended for the acquirement of lands for the Continental Divide National Scenic Trail and the Oregon, Mormon Pioneer, Lewis and Clark, and Iditarod National Historic Trails.¹⁴⁵

NOTES

¹16 U.S.C. §§ 532-38 (1976).

²H.R. Rep. No. 88-1920, 88th Cong., 2d Sess., reprinted in [1974] U.S. CODE CONG. & AD. NEWS 3994.

³*Id.* at 3995.

⁴*Id.*

⁵*Id.* at 3996.

⁶*Id.*

⁷*Id.*

⁸Id.
⁹16 U.S.C. § 533 (1976).
¹⁰Id. at § 534.
¹¹36 C.F.R. § 112 (1978).
¹²Id. at § 212.10.
¹³Id. at § 212.10(d).
¹⁴Id.
¹⁵Id. at § 212.10(d)(2).
¹⁶Id. at § 212.10(d)(3).
¹⁷16 U.S.C. § 536 (1976); 36 C.F.R. § 212.10(d)(4) (1978).
¹⁸Id.
¹⁹36 C.F.R. § 212.3 (1978).
²⁰16 U.S.C. § 535 (1976).
²¹Id. at § 535.
²²36 C.F.R. § 212.5(a) (1978).
²³Id. at § 212.5(b). The Fund operates pursuant to 16 U.S.C. § 572 (1976).
²⁴16 U.S.C. § 537 (1976).
²⁵36 C.F.R. § 212.6(d) (1978).
²⁶16 U.S.C. § 537 (1976).
²⁷Id. at § 1608.
²⁸Pub. L. No. 93-378, § 10, 86 Stat. 475 (1974).
²⁹S. Rep. No. 93-686, 93d Cong., 2d Sess., reprinted in [1974] U.S. CODE CONG. & AD. NEWS 4060, 4076.
³⁰Id.
³¹Id. at 4066.
³²Id.
³³S. Rep. No. 94-893, 94th Cong., 2d Sess., reprinted in [1976] U.S. CODE CONG. & AD. NEWS 6662, 6685.
³⁴Id.
³⁵Id. at 6686.
³⁶16 U.S.C. § 1608(c) (1976).
³⁷Id. at § 535(2).
³⁸Id. at § 1608(a).
³⁹31 U.S.C. § 1302(a) (1976).
⁴⁰16 U.S.C. § 1608(b) (1976).
⁴¹36 C.F.R. § 212.2 (1978).
⁴²Id. at § 212.4.
⁴³Id. at § 212.6(a).
⁴⁴Id. at § 212.6(b).
⁴⁵Id. at § 212.6(c).
⁴⁶Id. at §§ 212.7 & 260.01 et seq.
⁴⁷Id. at § 261.12.
⁴⁸Id. at § 261.50.
⁴⁹Id. at § 212.8(a).
⁵⁰Id. at § 212.8(b).

⁵¹Id. at § 212.11(a).
⁵²Id. at § 212.11(b).
⁵³Id. at § 212.9(a).
⁵⁴Id. at § 212.12.
⁵⁵Id.
⁵⁶49 U.S.C. § 1653(f) (1976).
⁵⁷Id. at § 1651(2).
⁵⁸S. Rep. No. 89-1659, 89th Cong., 2d Sess., reprinted in [1966] U.S. CODE CONG. & AD. NEWS 3362.
⁵⁹23 U.S.C. § 138 (1976).
⁶⁰S. Rep. No. 89-1410, 89th Cong., 2d Sess., reprinted in [1966] U.S. CODE CONG. & AD. NEWS 2800, 2837-38.
⁶¹49 U.S.C. § 1653(f) (1976).
⁶²23 C.F.R. § 771.19 (1978).
⁶³Id.
⁶⁴Id.
⁶⁵23 C.F.R. § 771.19(C) (1978).
⁶⁶Id. at § 771.19(d).
⁶⁷Pub. L. No. 95-625, § 551(2), 95th Cong., 2d Sess., 92 Stat. 3516 (1978).
⁶⁸23 C.F.R. § 771.19 as amended by 44 Fed. Reg. 26979-80 (1978).
⁶⁹23 C.F.R. § 771.19(g)(1) (1978).
⁷⁰Id. at § 771.19(g)(7).
⁷¹Pub. L. No. 90-495, 90th Cong., 2d Sess., 82 Stat. 823 (1968).
⁷²S. Rep. No. 90-1340, 90th Cong., 2d Sess., reprinted in [1968] U.S. CODE CONG. & AD. NEWS 3482, 3500.
⁷³23 C.F.R. § 771.19(j) (1978).
⁷⁴401 U.S. 402 (1971).
⁷⁵Id. at 411-13.
⁷⁶Coalition for Responsible Regional Development v. Brinegar, 518 F.2d 522, 525-26 (4th Cir. 1975).
⁷⁷Louisiana Env't'l Soc'y, Inc. v. Coleman, 537 F.2d 79, 84 (5th Cir. 1976).
⁷⁸49 U.S.C. § 1653(f) (1976).
⁷⁹Stop H-3 Ass'n v. Coleman, 533 F.2d 434, 442-43 (9th Cir. 1976).
⁸⁰Nat'l Wildlife Fed'n v. Coleman, 529 F.2d 359, 369-71 (5th Cir. 1976); Pennsylvania Env't'l Council, Inc. v. Bartlett, 454 F.2d 613, 622 (3d Cir. 1971).
⁸¹Named Individual Members of San Antonio Conservation Soc'y v. Texas Highways Dept., 533 F.2d 434, 442-43 (5th Cir. 1971).
⁸²Monroe County Conservation Council, Inc. v. Volpe, 472 F.2d 693, 700 (2d Cir. 1972).

83 Id. at 700-01.
 84 Arlington Coalition on Transp. v. Volpe,
 458 F.2d 1323-76 (4th Cir. 1972).
 85 Louisiana Env't'l Soc'y, Inc. v. Coleman,
 537 F.2d 79, 84 (5th Cir. 1976).
 86 D.C. Fed'n of Civic Ass'ns v. Volpe, 459
 F.2d 1231, 1239 (D.C. Cir. 1972).
 87 Brooks v. Volpe, 460 F.2d 1193, 1194 (9th
 Cir. 1972).
 88 Pub. L. No. 90-543, § 2, 90th Cong., 2d
Sess., 82 Stat. 919 (1968).
 89 National Parks and Recreation Act of 1978,
Pub. L. No. 95-625, § 551, 95th Cong., 2d Sess.,
92 Stat. 3511 (1978).
 90 H.R. Rep. No. 90-1631, 90th Cong., 2d
Sess., reprinted in [1968] U.S. CODE CONG. & AD.
NEWS 3855, 3856. See also U.S. BUREAU OF RE-
CREATION, TRAILS FOR AMERICA (1968).
 91 Id.
 92 42 U.S.C. § 1242 (1976 and Supp. III 1979).
 93 Id. at § 1244(a).
 94 Id. at § 1243.
 95 Id. at § 1243.
 96 Id. at § 1244(a).
 97 Id.
 98 Id. at § 1242.
 99 Id. at § 1244(b).
 100 See id. at §§ 1244(c)(1)-(14) and 1244(a).
 101 Id. at §§ 1244(c)(15)-(23). The two
 trails which go through the NFS are the Florida
 Trail and the Pacific Northwest Trail.
 102 Id. at § 1244(d).
 103 Id.
 104 Id.
 105 Id. at § 1244(e).
 106 Id.
 107 Id.
 108 Id.
 109 Id.
 110 Id. at § 1245.
 111 Id.
 112 Id. at § 1246(a).
 113 Id.

114 Id.
 115 Id.
 116 Id.
 117 Id. at § 1246(b).
 118 Id.
 119 Id.
 120 Id. at § 1246(c). The Secretary of In-
 terior has prohibited the use of motorized
 vehicles on the Appalachian and Pacific Crest
 Trails, 36 C.F.R. § 2.30 (1978).
 121 Id.
 122 Id.
 123 36 C.F.R. § 212.21 (1978).
 124 Id. at § 230.
 125 42 U.S.C. § 1246(c) (1978).
 126 Pub. L. No. 95-625, § 551(18), 95th
Cong., 2d Sess., 92 Stat. 3516 (1978).
 127 Id.
 128 16 U.S.C. § 1246(d) (1976 and Supp. III
1979).
 129 Pub. L. No. 95-248, § 1(3), 95th Cong.,
2d Sess., 92 Stat. 160 (1978).
 130 16 U.S.C. § 1246(e) (1976 and Supp. III
1979).
 131 Id. at § 1246(f).
 132 Id. at §§ 484a, 485, 486 (1976). See
also 36 C.F.R. § 251.6 (1978).
 133 Id. at § 1246(g) (1976 and Supp. III
 1979).
 134 Id.
 135 Id.
 136 Id.
 137 Id. at § 1246(h).
 138 Id. at § 1246(i).
 139 Id.
 140 Id.
 141 Id. at § 1247(c).
 142 Id. at § 1247(e).
 143 Id. at § 1248(q).
 144 Id. at § 1248(b).
 145 Id. at § 1249.

II. Management Functions

A. GENERAL PRINCIPLES (MULTIPLE-USE SUSTAINED-YIELD ACT)*

The concept of multiple-use sustained-yield (M-U S-Y) is discussed at this point because it has consistently been the cornerstone of Forest Service management planning. First expressed as a directive from the President when the Forest Service was first established in 1905,¹ the M-U S-Y concept has guided the Forest Service throughout its history. That concept was codified by the Multiple-Use Sustained-Yield Act of 1960² (MUSY) and was reaffirmed in the RPA of 1974, as amended by the National Forest Management Act of 1965 (NFMA).³

1. Multiple-Use Sustained-Yield Act of 1960

According to the Organic Act of 1897, watershed protection and timber production were the only express uses for which national forests were to be managed. Gradually, however, other activities such as grazing,⁴ recreation,⁵ and fish and wildlife preservation⁶ became recognized permissible uses of the national forests. Population expansion and industrial growth saw increased demands for both recreational opportunities and timber production. The response of the Forest Service was to try to accommodate all the potential and, at times, conflicting uses of the national forests through what has become known as the "multiple-use" concept.⁷

The management concept of multiple use became law in 1960 when the MUSY was enacted. That Act reflected an accommodation of the positions of two competing factions--the "single use" advocates on one hand and the "consumptive users" on the other. These opposing positions were argued by recreationists and conservationists versus industry interests such as timber, mining, grazing, and irrigating.

The MUSY stated a congressional policy "that national forests were established and were to be administered for outdoor recreation, range, timber, watershed, wildlife and fish purposes."⁸ It also provided that the Secretary of Agriculture was to develop and administer the renewable resources of the national forests for multiple use and sustained yields.⁹

The Act thus did two important things: (1) it expressly expanded the purposes for which the national forests could be administered to include outdoor recreation, range, and wildlife and fish purposes in addition to timber production and watershed protection; (2) it expressly approved the Forest Service's actual practice concerning

expanded uses by adopting the M-U S-Y concept as the management principle for the administration of national forests.

The terms "multiple use" and "sustained yield" were defined in the Act as follows:

"Multiple use" means: The management of all the various renewable surface resources of the national forests so that they are utilized in the combination that will best meet the needs of the American people; making the most judicious use of the land for some or all of these resources or related services over areas large enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions; that some land will be used for less than all of the resources; and harmonious and coordinated management of the various resources, each with the other, without impairment of the productivity of the land, with consideration being given to the relative value of the various resources, and not necessarily the combination of uses that will give the greatest dollar return or the greatest unit output.

"Sustained yield of the several products and services" means the achievement and maintenance in perpetuity of a high-level annual or regular periodic output of the various renewable resources of the national forests without impairment of the productivity of the land.¹⁰

On the one hand, the Act thus rejects a single-use-to-the-exclusion-of-all-others position by adopting the multiple-use concept. Instead, MUSY reflects a commitment to maximizing the beneficial uses of all resources of a particular forest by consideration of their respective values.¹¹ On the other hand, the Act adopts the limiting principle of sustained yield as a check against destruction of the forest by overuse. The sustained-yield concept has the effect of requiring that multiple use as a management principle be applied to achieve long-range ("in perpetuity") rather than short-term benefits. As stated by the USDA in a communication to the Senate Committee on Agriculture, to draft a bill "would help to assure the balance, development and use of national forest resources, and would prevent their possible future over-utilization as a result of economic and single-interest pressures."¹²

The ultimate responsibility for implementing the congressional policy reflected by MUSY is vested in the Secretary of Agriculture. But the generality of MUSY's mandate and the lack of express direction in the Act as to how the Forest Service is to implement the principles of M-U S-Y

*The notes for Part A begin on p. 27.

have caused problems in defining the scope of the Secretary's discretion. The Act contains some limitations on the Secretary's discretion, however. The Secretary is required to give "due consideration . . . to the relative values of various resources" in determining what uses are to be allowed.¹³ Moreover the Act recognizes that wilderness areas are compatible with the purposes of the Act. The definitions of "multiple use" and "sustained yield" in the Act also indicate that multiple use embraces periodic and seasonal changes to differing conditions. It acknowledges that all the land does not need to be used for all the uses. And ultimately the definition suggests harmonious, coordinated management of the resources with one another to maximize the productivity of the land based on the relative values of the resources and not on the economic return from them. The definition suggests various means by which the Secretary can justify favoring several or one use over others with respect to any particular area of land. The definition of sustained yield also serves as a limitation on the Secretary's decision-making. Sustained yield is defined as achieving and maintaining high level annual or regular periodic outputs of the resources without impairing productivity of the land. Hence, if high output results in the deterioration or destruction of the land, the use or activity should be restricted or denied.

One problem under M-U S-Y is whether the original uses under the Organic Act of 1897 have any preference or priority over the new uses under MUSY. Chief Forester McArdle seemed to reject any priority argument in a statement to congressional committees. He stated, "One of the basic concepts of multiple use is that all of the five resources in general are entitled to equal consideration, but in particular or localized areas the relative values of this area's resources will be recognized."¹⁴ Chief McArdle's interpretation of multiple use was incorporated verbatim into the House and Senate committees' reports on the bill. The committees also added the observation, "no resource will be given a statutory priority over the others."¹⁵ However, the Act itself does not incorporate the "no statutory priority" proviso nor does it use the "equal consideration" language of Chief McArdle. Instead, the Act mandates only "due consideration" of the relative values of each resource in the administration of the national forests.

MUSY itself, however, does contain some language that suggests priorities were intended. The House committee amended section 1 of the Act to provide that its purposes are "supplemental to, but not in derogation of, the purposes for which the national forests were established as set forth in the Act of June 4, 1897 (16 U.S.C. § 475)."¹⁶ That language suggests that the purposes of the 1897 Act may have some priority over the new uses recognized in MUSY, perhaps, for example, by meaning that a national forest may not be created for one of the new uses unless timber production or watershed protection was a stated purpose as required by § 475 of the Organic Act of 1897.¹⁷

The extent to which the 1897 Act may have been amended or repealed by MUSY has been dealt with in the courts. That question was presented in the appeal of West Virginia Division of the Izaak Walton League of America, Inc. v. Butz¹⁸ in which the lower court had held that the Forest Service violated the 1897 Act in its method of selling and cutting timber in the Monongahela National Forest. The trial court held that the 1897 Act required explicit methods for marking and designating trees to be cut and sold which was not being applied in the current sale. On appeal, the government argued that the restrictive provisions of the 1897 Act had been modified by MUSY. The court rejected that argument in light of the language of the 1960 Act providing that MUSY is supplemental to, and not in derogation of, the 1897 Act.

The effect of the 1960 Act on the 1897 Act was also raised in United States v. New Mexico.¹⁹ The Forest Service in that case argued that the purposes for which forests have been created had been modified by MUSY. The Supreme Court had to decide whether the purposes of national forests included in-stream uses. That determination would limit the amount of water which the government could claim under the Reserved Rights Doctrine. The government claimed water rights to in-stream uses, such as wildlife habitats, recreational purposes, and preservation of fish. The Court concluded that those were not embraced within the original purposes of § 475, which was limited to watershed protection and timber supply. The Court stated that MUSY may have prospectively added new purposes and uses for which national forests may be created, and could not operate retroactively to expand those purposes from the ones stated at the time of the reservation. The Court, in reaching that interpretation, relied heavily on the statement expressed in the Act that it is supplemental to the 1897 Act.

One major limitation in the statutory language is the requirement that due consideration be given to all competing uses in making the determination. And the consideration to be given to the various uses must be directed towards the value of the particular resources in specific areas and not the respective use. Interpretation and application of this due consideration requirement has posed problems for the courts.

Recent litigation has seen management decisions under MUSY questioned. Sierra Club v. Hardin²⁰ presented the question, inter alia, whether a timber sale in the Tongass National Forest violated MUSY by not giving sufficient consideration to other uses of the forest. The court acknowledged the broad discretion given the Forest Service in management decisions concerning use of national forests and expressed its reluctance to interfere with those decisions. The court pointed out that under MUSY, however, the decision could be reviewed to determine if the requirements of the Act were satisfied. Specifically, the court considered whether "due consideration" had been given to the relative values

of all the surface renewable resources in the forest.

The plaintiff's evidence, the court noted, clearly established that the forest had been predominantly managed for timber production to the exclusion of other uses. The court held that this did not establish that the Forest Service failed to give due consideration to the other values as required by MUSY. The court concluded that, absent a showing of no consideration or a lack of knowledge of the other values, the court would presume that the Forest Service gave some consideration to the other values. In interpreting the meaning of "due consideration," the court rejected the argument that "equal" consideration of all other resources was required. The court stated that such consideration would be contrary to the express provisions of MUSY. The court held that unless there was evidence that no consideration had been given to the various uses, the Forest Service would be presumed to have given consideration to those uses. Hence the Act was complied with.

The issue of whether the Forest Service had adequately treated various uses has been raised in other contexts. In Dorothy Thomas Foundation, Inc. v. Hardin²¹ an injunction of a proposed timber sale was sought on the grounds that the Forest Service gave inadequate consideration to other uses, particularly recreational ones in the area. The preliminary injunction was denied because the plaintiffs failed to show irreparable harm or their likelihood to succeed on the merits. The court found that the plaintiffs' testimony merely reflected disagreement between uses of the forest and stated that the judgment rested with the Forest Service and MUSY. The government had presented evidence from a four-person task force that was charged with determining whether MUSY had been complied with in making the timber sale. The court also noted that the decision concerning the ultimate use was not subject to review.

Parker v. United States²² presented another problem of interpreting MUSY, but this time in conjunction with the Wilderness Act. In that case the Forest Service proposed to sell timber in areas adjacent to wilderness areas which the plaintiff contended would be suitable for study as wilderness areas under the Wilderness Act of 1964.²³ The Forest Service argued in part that its study of the contiguous area for wilderness and its determination of a timber sale under MUSY was conclusive on the question of the use of the area.

The court rejected that argument. The court noted that the determination of wilderness areas for purposes of MUSY had been changed by the requirements of the Wilderness Act. Under the Wilderness Act the Forest Service was required to make determinations of whether areas were suitable for inclusion in a study to be provided to the Secretary and the President for a report to Congress. Under the 1964 Wilderness Act the determination of wilderness areas was not left to the

Secretary, but rather to Congress. Hence, once it was determined that the area was suitable within the statutory definition of wilderness under the Wilderness Act, then that Act required that the area be included in the report to the President and Congress. Since the timbering would make the area unfit for wilderness, it had to be stopped pending a final evaluation by the President and Congress.

This abbreviated review of relevant cases interpreting MUSY reflects several things. First, it must be noted that in each of these cases other statutory violations have typically been raised, notably NEPA and regulatory statutes. The courts, in their interpretation of M-U S-Y violations seem consistent in interpreting the discretion of the Forest Service rather broadly concerning management of forests. But this interpretation does not mean that the decisions are not subject to judicial review. Multiple-use decisions have been reviewed to determine that the particular requirements of the statute, however general, have been met. The courts, however, have declined to arbitrate or decide differences of opinions between various groups and the Forest Service concerning a particular use of the forest. If the decision to allow that use has been made in the manner required by the statute, the judgment of the Forest Service based on its expertise will prevail.

In summary, even though the Forest Service has been found to have broad authority to determine uses of national forests under the Organic Act and MUSY, that authority is not completely discretionary with the agency. That authority must be exercised in a manner that is consistent with the express limitations of the Act. For example, allowing a use for purposes other than watershed protection and timber supply under the 1897 Act or the supplemental purposes of outdoor recreation, range, timber, watershed, and wildlife and fish purposes under the supplemental uses added in the 1960 Act would be subject to review and overturning by a court. Similarly, failure to give "due consideration" to the relative values of the renewable surface resources would likewise be subject to review. That situation might arise if the Forest Service authorized a particular use without considering at all other possible uses of the resources of the forest. And arguably, determining uses by setting priority among them or giving value preferences to particular uses over other uses could violate the statute. That conclusion would rest on an interpretation of multiple use as defined in the statute as meaning that Congress intended no use to have a priority or preference over other uses, but rather that each use should be initially equal and evaluated according to its respective merits in each situation.

2. Multiple-Use Sustained-Yield: Post RPA/NFMA

As noted above, under MUSY of 1960 multiple-use and sustained-yield are general concepts, more expressions of policy than explicit directives for

land management planning. The usefulness of the multiple use concept, even as a statement of policy, has been questioned.²⁴ Because of its vagueness, "multiple use" poses interpretive difficulties, and, more importantly, as statutorily defined it has provided no real check on arbitrary or unreasoned decisionmaking. Nonetheless, multiple use has recently been reaffirmed as the single most important guiding principle of national forest management by NFMA (amending the Forest and Rangeland Renewable Resources Planning Act of 1974). An important question is the extent to which, if any, NFMA has clarified the concept of multiple-use sustained-yield. Although NFMA primarily relates to the means by which the basic management principle of M-U S-Y is implemented, the land management planning process, that Act necessarily has a bearing on the meaning of multiple use and sustained yield. Accordingly, the NFMA as it relates to ultimate land management planning objectives is discussed in this part.

NFMA obviously continues the commitment to the principles of M-U and S-Y. The Act contains numerous references to MUSY; most of these references appear in directions that activities under the Act are to be performed in accordance with or under the principles contained in MUSY. The NFMA directs that the program is to be developed "in accordance with the principles" set forth in MUSY,²⁵ regulations for the planning process are to be promulgated "under the principles" of MUSY,²⁶ plans are to provide for M-U and S-Y in accordance with MUSY,²⁷ and increased timber harvest levels through intensified management practices are justified only if "in accordance with" MUSY.²⁸ The comprehensive assessment of supply and demand of resources and potential uses on which the renewable resource program is based is to be developed in part "though . . . coordination of multiple use and sustained yield opportunities as provided in" MUSY.²⁹ Finally, the Forest Service is directed to take action that will assure that development and administration of the renewable resources of the NFS "are in full accord with the concepts for M-U S-Y of products and services as set forth in" MUSY.³⁰

In addition to the references to MUSY itself, the Act is peppered with numerous references to the concept of multiple use (and less frequently, sustained yield). The Act refers to multiple-use benefits, values, objectives, relationships, management objectives, and procedures. The Program, for example, must include recommendations which include an evaluation of objectives for the major Forest Service programs "in order that multiple-use sustained-yield relationships among and within the renewable resources can be determined."³¹

Multiple use is mentioned several times in connection with regeneration of the national forests. In § 1607, "the major portion of planned intensive multiple-use sustained-yield management procedures" are directed to be operative by the target year 2000. The level and types of treatment to be used under the statutorily-mandated

reforestation treatment program are "those which secure the most effective mix of multiple use benefits."³² The estimate of sums required for reforestation shall be those necessary to "establish and improve growing forests to secure planned production of trees and other multiple use values."³³ Lands classified as unsuitable for timber production are to be "treated for reforestation purposes, particularly with regard to the protection of other multiple-use values."³⁴

The timber harvest and sale provisions of the NFMA also include specific references to multiple use. One of the required regulations for timber sales is to direct that "the consistency of the sale with the multiple use of the general area" be assessed before the sale.³⁵ The Act contains a mandate for establishment of exceptions to timber harvest standards for certain species of trees in management units "after consideration has been given to multiple uses of the forest including but not limited to, recreation, wildlife habitat, and range."³⁶ In the section limiting the allowable sale quantity, the Act permits "an allowable sale quantity for any decade departing from the projected long-term average sale quantity (established on a sustained-yield in-perpetuity basis) "in order to meet overall multiple-use objectives."³⁷ The departure also must "be consistent with the multiple-use management objectives of the land management plan."³⁸

The congressional emphasis and reliance on the concept of multiple-use as the single most important general principle of NFS land management planning is apparent. But the difficult issue under NFMA is the extent to which it provides direction concerning the analysis to be used in quantifying or establishing priorities under the multiple use standard.

In MUSY Congress did not indicate what consideration was "due" in a given instance nor what steps must be taken in applying the multiple use management concept. Unlike MUSY, NFMA provides a statutory framework--the NFMA land management planning process, within which the MUSY principle is to be applied. The process outlined in NFMA constitutes a statutory directive as to how the MUSY concept will be implemented in management of the national forests.

In NFMA no attempt is made to elaborate the definitions of multiple use and sustained yield from MUSY of 1960. Nor does NFMA provide the planner with a guideline or formula for making the trade-offs and balancing competing uses required in the multiple-use determination. Indirectly, however, NFMA does give a somewhat clearer delineation of the multiple-use concept in national forest land management planning. NFMA does so by requiring that certain steps be taken in the planning process and that guidelines for planning be adopted to insure that the various potential uses and values of the national forests are evaluated and considered. What consideration to the relative values of the various resources of the forest is

"due," at least from a procedural standpoint, has been clarified.

Multiple use remains a flexible concept under NFMA because of "the wide variety of biological, environmental, and economic conditions found among the 154 national forests [which] makes it impossible to set hard and fast rules for their management."³⁹ The Conference Committee recognized that "the specific level of each use may well vary over time in response to these various conditions."⁴⁰

What Congress has added to the multiple use concept in NFMA is the requirement that the Forest Service establish guidelines in the planning process that implement the goal of multiple use. M-U S-Y still may be "more of a slogan than a blueprint for actual management."⁴¹ But in the context of NFMA it is no longer considered merely a constraint on administration of the national forests, but must be viewed as an integral part of a positive mandate to manage the national forests for the greatest long-range benefits of those forests. To that end, the concepts of an integrated plan, public participation, and an interdisciplinary planning process were incorporated into NFMA.⁴²

The basic steps of the planning process, which is discussed in more detail below, are: (1) collection of inventory data on the resources of the planning unit; (2) evaluation of the potential of the unit to support outputs of the resources; and finally (3) determination of the most effective mix of resources for which the forest should be managed. The raw materials for the planning effort are provided by the Assessment. The Secretary is to discuss, as part of the Assessment, "policy considerations, law, regulations, and other factors" anticipated to affect national forest management.⁴³ This is in addition to (1) an inventory of present and potential renewable resources; and (2) "evaluation of opportunities for improving their yield of tangible and intangible goods and service."⁴⁴

Guidelines also are required under NFMA that provide for obtaining renewable resource data within the planning process.

The planning team must identify, based on the inventory data, the suitability of lands for resource management under guidelines established in the NFMA regulations. This determination also is based on the existence of circumstances that create hazards to any given resource and the relationship of those circumstances to alternative activities.⁴⁵

NFMA seems to establish a two-pronged determination of suitability: (1) for resource management generally, and (2) for timber production specifically. The second determination necessarily follows and may be included in the first. In § 1604(k) the Secretary is directed to "identify lands within the management area which are not suited for timber production. . . ." The term "management area" is not defined but apparently

means the "unit" of planning. There are numerous constraints on timber production primarily relating to safeguards against interference with or degradation of other resource uses. The capability of the land to produce timber is the initial focal point. The land management planning process must "classify" the land and determine its resource capability for all resources, however, not just timber. NFMA provides that the plan is developed "in light of all the uses [in the Act itself], the definition of the terms 'multiple use' and 'sustained yield' . . . and the availability of lands and their suitability for resource management."⁴⁶ It also requires development of regulations which specify guidelines that require "the identification of the suitability of lands for resource management."⁴⁷ The initial determination of physical capability of the land to produce a single resource is not inconsistent with the M-U S-Y concept. As previously noted, the statutory definition of multiple use contemplates the practical reality that a given forest will not support all resource uses, including wood fiber production. NFMA itself, not inconsistently with the multiple-use concept, is premised on another reality that the major resource of the national forest is timber, whether being utilized for wood fiber production or not. Before the trade-off and balancing process culminating in the final plan takes place, each potential output must be considered separately. Multiple use management cannot mean managing a unit or part of a unit for resources that are not there or for resources which are not feasible to attempt to introduce. Ideally, each output would be assigned a net value in terms of the return to be expected from a given management input.

The emphasis of MUSY of 1960 was the tangible resources of the forests. But it has become apparent that multiple-use management means consideration of environment, or aesthetic or other intangible values. In the section concerning even-aged management techniques NFMA refers to "esthetic resources" and esthetic . . . impacts."⁴⁸ Moreover, the mandatory inventory is to "identify new and emerging resources and values."⁴⁹ There is little doubt that multiple-use is not to be limited by the outputs specifically mentioned in either MUSY and NFMA but should be interpreted to include all valuable outputs of the forests. Implicit in the modern-day concept of multiple use are such values as attractive environment and general conservation.⁵⁰ Although the sustained-yield concept is a specific directive to conserve the future productive capacity of the forests, preservation of the natural resources of the forests for their own sake may even be viewed as a "use" under the multiple-use standards.⁵¹

The "bottom line" of the planning process is the formulation of the proposed and possible actions in the unit for the duration of the plan; the plan ultimately must devise the management systems for the unit.⁵² The planning team thus engages in a "quasi-legislative" function of deciding the future of the land and its clientele.⁵³ The basic principle is that the team must give full and impartial consideration to all the potential

uses of the forest. It must decide where and in what manner these uses are to be coordinated one with the other. The task is difficult and complex.⁵⁴

One of the more difficult problems for the planner is the task of measuring the respective value of potential forest outputs. The basic function of the planning team is to evaluate the relative value of uses for which the unit may be suitable, subject to whatever specific constraints exist either by way of pragmatic considerations, guidelines imposed by statute, or regulation. The only common unit of valuation yet invented is money. As to a forest output that can be readily assigned a monetary value, determination of a value for that single output can be measured objectively. As to the timber resource, for example, NFMA directs that a monetary evaluation be made of the value of projected timber production.⁵⁵ As to other outputs of the forest, however, the valuation issue is not addressed.

The difficulty of measuring outputs other than the wood resource in monetary terms may explain the need for specific protections of aesthetic or intangible values. The tendency of the land manager when confronted with a choice between measurable value and intangible value might be to discount the latter.⁵⁶ By directing that resources such as watershed, wildlife, and fish be protected and provided for, the Act has declared that these resources do undoubtedly have a value. It gives no specific means, however, of quantifying their value. It seems obvious that the congressional intent was that the interdisciplinary planning team utilize its expertise and the input of the public to arrive at an appropriate value for those uses for which no specific monetary value can be determined.⁵⁷ With some forest uses, such as recreation which likely do not have a specific market value, potential users may be able to assess a projected value. As one long-time commentator on forest management observed, an estimated value of a forest output based in part on consumer reaction "may be as accurate, even when imprecise, as the estimate of the production function or the physical response of the forest to a particular management practice."⁵⁸ Various approaches have been devised to measure the extra-market benefits of outputs that do not have a clear monetary value;⁵⁹ presumably, the method used to measure the value in such instances will be acceptable if it constitutes a bona fide attempt to attach reasonable value and it is subjected to public scrutiny.

Despite the emphasis of NFMA on the timber resource and reforestation for timber production as a dominant or priority use of the national forests, a more reasonable view is that timber production has been the logical focal point of forest planning because it is assumed to be the major resource generally of the forest. Indeed, NFMA directs that timber production is to be maximized but only to the extent consistent with securing "the most effective mix of multiple use benefits."⁶⁰ The Act also explicitly recognizes

that reforestation may be primarily to protect wildlife, watershed, or other values rather than to make the land suitable for timber production.⁶¹

NFMA cannot be said to have adopted a "dominant use" philosophy if by that is meant a more-or-less permanent classification of public land areas according to their highest and best use. The multiple use/dominant use controversy is largely a semantic question that is simply not relevant to interpretation of the land management responsibility of the Forest Service. As pointed out by one commentator, the controversy is not really dominant or exclusive use as opposed to multiple use.⁶² The controversy instead is between a flexible land management policy, on the one hand, and a rigid one on the other. Establishment of special use areas such as wilderness is an example of a rigid land use decision. MUSY is effectively suspended on these tracts.

Multiple use implies flexibility to meet changing needs. Multiple use management does not preclude recognition of the dominant importance of uses within a given area or the establishment of a dominant use within an area. Even the multiple use "purist" would have to acknowledge that multiple use does not actually mean multiple ultimate use, but merely multiple use consideration. The decisionmaking process obviously establishes priorities among uses and may foreclose some uses altogether. The crucial point is the multiple use management means not only that the "dominant" use is subject to change but that to the extent possible other compatible uses in the same area will be promoted.

The problems of forest management in the past may not be so much a problem of improper trade-offs or the foregoing of the development of one resource at the expense of another. Instead, the problem often may have been one of simply not promoting all compatible outputs. One cannot assume that the uses for which a forest could suitably be managed are in all cases, or even many cases, necessarily and completely incompatible. Perhaps the most useful way to approach the question of multiple use is through a compatibility analysis.⁶³ Such an approach would be perfectly consistent with the maximization-through-coordination policy of NFMA. Timber production, for example, is at least moderately compatible (or not incompatible) with other uses and values except wilderness. Timber production may enhance the production of other resources such as forage. The compatibility approach would require the planner to determine the capability of a land area to support more than one use for which the land is suitable with some adjustments but without great diminution of the value of any of such uses.

Another problem for the planner is the wide gap between the planning model underlying NFMA and the realities of current forest management. The NFMA model for implementing MUSY assumes: (1) comprehensive knowledge of resource and potential uses; (2) an ability to determine the precise potential of land and to anticipate all adverse

effects from management alternatives in advance; and (3) a state-of-the-art capable of determining an optimum mix of uses that minimizes adverse effects. But literal compliance may be impossible as a practical matter. Congress seems to have given implicit recognition of this fact in NFMA by its adoption of a non-prescriptive approach to the planning process. The problem is lack of scientific and technological know-how to implement the statutory model. Detailed inventories of all the national forest acreage in the immediate future may not be a realistic possibility. Moreover, the concept of "ecosystem" is so complex and multivariable that quantitative evaluation of interactive ecosystems is not really possible with our present knowledge.⁶⁴

The Forest Service regulations should candidly acknowledge that multiple use judgments are of necessity evaluative in nature and naturally imprecise. To make its use decisions defensible, the Forest Service should obtain an approach that demonstrates a good faith and reasonable effort to obtain as much data as possible, including representative and adequate samples, and the use of the best available expertise in the decision-making process.⁶⁵ The problem of incomplete information and knowledge should not be ignored nor glossed. The problem should be recognized, and the best possible solution under the circumstances should be attempted.

In summary, it can be said that "multiple use" is indeed a vague concept. But it is clear that multiple use (and its corollary constraint, sustained yield) is the principle that defines the ultimate statutory duty of the Forest Service in managing the NFS. The problem is translating the principle into practice.

Care should be taken to understand what the concept of multiple use means after NFMA. Multiple use is a changing concept. It may be seen in its early stages as a reaction to single or dominant use interests. Because the relative values of uses of the forests had not crystallized, the mandate of multiple use was, in effect, not to ignore any possible use in decisionmaking. NFMA, however, appears to impose a positive duty on the Forest Service to provide for multiple uses in the national forests. The emphasis of that Act is on the opportunities for multiple use rather than on the constraints the concept may impose.

In recent decades new legislation, much of it not relating specifically to Forest Service activities, has been enacted. This legislation reflects a public policy or emphasis on specific resources or values, for example, the Wilderness Act, NEPA, and the Endangered Species Act. These statutes may limit the discretion otherwise granted the Forest Service under the multiple use concept. A significant part of the data that must be reconciled by the planning team are the legal constraints on land management. The specific requirements and limitations of those statutes are examined next.

NOTES

¹See Huffman, A History of Forest Policy in the United States, 8 ENV'T'L L. 239, 267 (1978).

²16 U.S.C. §§ 528-31 (1976).

³Pub. L. No. 94-588, 90 Stat. 2949, amending 88 Stat. 476, codified in 16 U.S.C. §§ 1601-14 (1976). NFMA made the 1960 Act's name officially Multiple-Use Sustained-Yield Act of 1960. Pub. L. No. 94-588, 90 Stat. 2949, § 19.

⁴Chief Forester Gifford Pinchot drafted a letter to himself dated Feb. 1, 1905, for Agriculture Secretary Wilson's signature whereby Pinchot was directed to include forage as a third legitimate use to be made of national forest lands. Thus, with no particular authorization from Congress, Pinchot, via Secretary Wilson's signature, confirmed grazing on the national forests as a legal use of forest reserves.

⁵Agriculture Appropriations Act (Term Lease Law), 38 Stat. 1086, 1101 (March 4, 1915).

⁶Act of August 11, 1916, 39 Stat. 446, 476.

⁷See generally McCloskey, Note and Comment: Natural Resources--National Forests--The Multiple Use-Sustained Yield Act of 1960, 41 ORE. L. Rev. 49 (1961).

⁸16 U.S.C. § 528 (1976).

⁹Id. at § 529.

¹⁰Id. at § 531.

¹¹See Wilson, Land Management Planning Processes of the Forest Service, 8 ENV'T'L L. 461, 462-63 (1978).

¹²S. Rep. No. 1407, 86th Cong., 2d Sess., reprinted in [1960] U.S. CODE CONG. & AD. NEWS 2377.

¹³16 U.S.C. § 529 (1976).

¹⁴National Forests--Management, S. Rep. No. 1407 (May 23, 1960); H. Rep. No. 1551 (April 25, 1960).

¹⁵Peterson, Executive Communication No. 1804, H. Rep. No. 1551, 86th Cong., 2d Sess. (1960).

¹⁶H. Rep. No. 1551, 86th Cong., 2d Sess., reprinted in [1960] U.S. CODE CONG. & AD. NEWS 2378.

¹⁷See United States v. New Mexico 438 U.S. 696 (1978).

¹⁸367 F. Supp. 422 (N.D.W. Va. 1973), aff'd, 522 F.2d 945 (4th Cir. 1975).

¹⁹438 U.S. 696 (1978).

²⁰325 F. Supp. 99 (D. Alaska 1971).

²¹317 F. Supp. 1072 (W.D.N.C. 1970).

²²309 F. Supp. 593 (D. Colo. 1970).

²³16 U.S.C. §§ 1131-36 (1976).

²⁴See M. CLAWSON, MAN, LAND, AND THE FOREST ENVIRONMENT 56 (1977); Spurr, Comments on "Timber Resources," 54 DEN. L.J. 545, 549 (1977).

²⁵16 U.S.C. § 1602 (1976).

- ²⁶ *Id.* at § 1604(g).
- ²⁷ *Id.* at § 1604(e)(1).
- ²⁸ *Id.* at § 1604(g)(3)(D).
- ²⁹ *Id.* at § 1600(3).
- ³⁰ *Id.* at § 1607.
- ³¹ *Id.* at § 1602(5).
- ³² *Id.* at § 1601(d)(1).
- ³³ *Id.* at § 1601(d)(2).
- ³⁴ *Id.* at § 1604(k).
- ³⁵ *Id.* at § 1604(g)(3)(F)(ii).
- ³⁶ *Id.* at § 1604(m)(2).
- ³⁷ *Id.* at § 1600(a).
- ³⁸ *Id.*
- ³⁹ 122 CONG. REC. H12,022 (Sept. 30, 1976) (statement of Congressman Symms).
- ⁴⁰ *Id.*
- ⁴¹ Clawson, *The Concept of Multiple Use Forestry*, 8 ENV'T'L L. 281 (1978).
- ⁴² HOUSE COMMITTEE ON AGRICULTURE, BUSINESS MEETINGS ON NATIONAL FOREST MANAGEMENT ACT, S. 3091, 94th Cong., 2d Sess., at 88-89 (1976).
- ⁴³ 16 U.S.C. § 1601(a)(4) (1976).
- ⁴⁴ *Id.* at § 1601(a)(2).
- ⁴⁵ *Id.* at §§ 1604(g)(1)(A)-(C).
- ⁴⁶ *Id.* at § 1604(e)(2).
- ⁴⁷ *Id.* at § 1604(g)(2).
- ⁴⁸ *Id.* at §§ 1604(g)(3)(F)(ii) & (v).
- ⁴⁹ *Id.* at § 1603.
- ⁵⁰ See Clawson, *supra* note 41, at 286.
- ⁵¹ W. SHANDS & R. HEALY, *THE LANDS NOBODY WANTED* 63 (1977).
- ⁵² 16 U.S.C. §§ 1604(e) & (f) (1976).
- ⁵³ Behan, *Political Popularity and Conceptual Nonsense: The Strange Case of Sustained Yield Forestry*, 8 ENV'T'L L. 309, 339 (1978).
- ⁵⁴ K. DAVIS, *LAND USE* 93 (1976), in which the author characterizes multiple-use as a "forum" for working out an accommodation of the wide range of interests in national forests.
- ⁵⁵ 16 U.S.C. §§ 1604(k) & (l) (1976).
- ⁵⁶ Juday, *Old Growth Forests: A Necessary Element of Multiple Use and Sustained Yield Forest Management*, 8 ENV'T'L L. 497, 520 (1978).
- ⁵⁷ This appears to be the current position of the Forest Service. See Final Rule § 219.12(e)(2), 44 Fed. Reg. 53,988 (Sept. 17, 1979).
- ⁵⁸ Clawson, *supra* note 41, at 294.
- ⁵⁹ DAVIS, *supra* note 54, at 155.
- ⁶⁰ 16 U.S.C. § 1601(d)(1) (1976).
- ⁶¹ *Id.* at § 1604(k).
- ⁶² See CLAWSON, *supra* note 24, at 37-38.

⁶³ *Id.*; DAVIS, *supra* note 54, at 293-94.

⁶⁴ Remarks of Larry Lattmna, Dean, College of Mines; Dean, College of Engineering, University of Utah, Salt Lake City, Utah, Friday, August 18, 1978, Conference on Energy and the Public Lands, III, Park City, Utah, August 16-18, 1978.

⁶⁵ Clawson, *supra* note 41, at 291.

B. SPECIFIC RESOURCES

1. Timber

Public lands originally were authorized to be reserved as national forests "to improve and protect the forest within the reservation"¹ The purposes to be achieved by improvement and protection of the forest were twofold: (1) to protect water flow and watershed; and (2) to furnish a continuous supply of timber for the American public.² As noted earlier, the national forests historically have supported and have been administered to provide for other uses, but timber production has been a primary objective of national forest management. Under recent legislation relating to Forest Service activities, particularly the NFMA of 1976,³ timber production will continue to occupy a major role in national forest land management planning. Recent legislation has imposed a number of constraints, however, on timber production.

One general constraint is the concept of multiple use and sustained yield. Its effect is to require that timber management decisions be made in a context which emphasizes open, objective consideration of the other possible uses and values of the forest.⁴ Planning for timber management is to be integrated with planning for other uses of the forests during the land management planning process.⁵ A number of more specific constraints have been imposed by law, most notably by NFMA and NEPA,⁶ which affect decisions as to timber management. The constraints on timber management can be usefully viewed as limitations on two separate levels of decisionmaking: the timber production decision and the timber harvesting decision. The heavy emphasis of NFMA on timber harvesting practices is understandable in view of the controversy that helped precipitate its enactment.⁷ Nevertheless, this should not obscure the fact that harvesting is only one aspect of timber management under NFMA. Evaluation of timber production potential occurs at the initial stage of the land management planning process in which the land in the planning area is evaluated generally for its highest and best uses. Based on the data compiled in the Assessment, this evaluation involves a determination whether the land can or should be managed for one particular use or several uses, timber production being one possible use. Under NFMA this evaluation is couched in terms of

* The notes for Part B begin on p. 36.

determining the "suitability" of the land for particular uses. Those separate suitability determinations are expressly mentioned in the Act:

(1) Suitability for resource management.

The Secretary of Agriculture is required to assure that the plans establish forest management systems, harvesting levels and procedures in light of multiple use values, the concepts of multiple use and sustained yield, and "the availability of lands and their suitability for resource management."⁸ The Secretary is further required to promulgate regulations which specify guidelines that "require the identification of the suitability of lands for resource management."⁹

(2) Suitability to provide for plant and animal diversity. The Secretary also must include in the regulations guidelines for a land management plan (LMP) which "provide for diversity of plant and animal communities based on the suitability and capability of the specific land area."¹⁰

(3) Suitability for timber production. The Secretary is directed to "identify lands within the management area which are not suited for timber production, considering physical, economic, and other pertinent factors to the extent feasible" in developing the LMPs required by the Act.¹¹

Interpretation of the term suitability as used in the Act is complicated for a number of reasons. "Suitability" is not defined in the Act itself. This omission presents another instance of a pervasive problem under NFMA: whether the meaning of an undefined term is to conform to common usage or the technical meaning it might have as a term of art in a particular profession such as land use planning or forestry. Disagreement exists among planning professionals as to the precise meaning of the term. There seems to be a consensus, however, that the "suitability" determination means an evaluative judgment of a given resource's potential to produce goods or services in the future if that resource is managed in a certain manner, not an evaluation based on a resource's ability to regenerate itself without active management. Whether a land area is suitable for resource management involves the question whether the present or predicted management techniques that can be used on the land will produce goods or services from that land's resources. Implicit is the idea that the predicted output of goods or services will reach a level to justify the resource management inputs. Accordingly, suitability has been described as "managed suitability."¹²

The meaning of the concept of "availability" in NFMA appears clearcut. The concepts of "availability" and "suitability" are closely related,¹³ but the availability and suitability determinations are functionally distinct. Land cannot be found "suitable" for management of a given resource under any reasonable definition of that term unless that land is first determined to be "available" for management. Section 1604(e)(2) assumes that those lands that are inaccessible or

incapable of development of any particular resource, including areas such as wilderness that have been removed from resource management by law, will be identified at the outset of the planning process. Those lands accordingly could not be suitable for management of the excluded resource or resources.

Apparently Congress intended the concept of "suitability" in the Act to include the inherent capacity of the land to produce a given resource, a characteristics referred to in planning as "capability." Presently, NFS lands are classified as commercial timberland based solely on capability, i.e., their biological potential to produce minimum amounts of timber annually. The Forest Service has established five site classes ranging from Site Class I, which can produce 165 or more cubic feet per year annually, to Site Class V, which can produce only 20 to 50 cubic feet per acre. These site classifications are not based on economic factors nor the potential to increase production through intensive management. The Forest Service apparently intends to continue a similar classification scheme; land will be deemed not suited for timber production if its biological growth potential is below the minimum standard for timber production set by the regional plan.¹⁴

Land also may be classified as incapable of producing a given resource if production of that resource will irreparably damage its potential for future production. The Forest Service in its NFMA regulations proposed to classify timberland as not suited for timber production if harvesting will irreversibly damage soil, slope, or other watershed conditions, or will adversely affect threatened or endangered species, or the land cannot be adequately restocked within five years after harvest.¹⁵

An important factor in determining suitability of lands for timber production is economic efficiency. Economic considerations may render land otherwise capable of supporting timber production, nevertheless, unsuited for timber production. Congress clearly acknowledged this in § 1604(k) of NFMA, the so-called marginal lands section, when it listed "economic" factors as one consideration in the suitability for timber production decision. The emphasis on economic factors is partly based on a reaction to the 20 cubic feet per acre per year cut-off point the Forest Service has used for classifying commercial timberland, which some believe has contributed to frequent sales of timber below cost.¹⁶ The marginal land provision is designed to insure adoption of a cost accounting system that considers the costs of managing the site for timber production.¹⁷

NFMA does not prescribe any particular form of economic efficiency analysis. In the section of NFMA that mandates formulation of a benefit-cost process for evaluation of the Program, however, a simple formula is suggested: balance of the estimated expenditures of reforestation, timber stand improvement, and the sale itself against the return to the government from the sale.¹⁸ The

question of economic suitability will be based on a myriad of factors such as terrain, accessibility, distance from lumber and pulp mills, and desirability of tree species. It also will be based on projections of costs of permissible vegetation management practices and future markets.

Whether using lands for timber production is economically efficient also involves projections as to future markets and estimates of production costs and profits associated with permitted vegetation management practices. Hence, the question tends to merge into the complex multiple-use determination of suitability for resource management generally; what vegetation practices are appropriate must be based in part on their effects on other outputs of the management unit. Section 1604(k) of NFMA, as ultimately enacted by Congress, clearly expresses that the determination of suitability for timber production is not made exclusively on the basis of economic factors. Consideration also is required of "physical" and "other factors." Congress obviously wanted to preclude commercial timber production where uneconomical, but it also wanted the timber production decision to be made by reference to other than economic factors, including environmental considerations and developments in forestry.¹⁹ Presumably those other factors necessarily would be considered in the multiple use planning process, but the cautionary language was intended to underline the congressional fear of undue emphasis on a single factor.

As discussed in section A of this chapter, it may be possible in the abstract to separate the idea of suitability of land for management of a particular resource, such as timber (by reference to only that resource), from the notion of suitability of management for a given resource, including timber, in light of the other potential uses of the forest. The former would emphasize constraints and restrictions specifically applicable to that resource, for example, the provision for diversity of tree species discussed below. The latter could be viewed as the ultimate multiple-use determination--the decision as to the relative suitability of land to produce separate outputs which may involve a trading and balancing among those potential outputs.

It is not clear whether the "other pertinent factors" in § 1604(k) should be interpreted to include relative suitability for timber production vis-a-vis other resource outputs. In any event the Forest Service must ultimately decide that question, whether by virtue of § 1604(k) or the general multiple use management mandate. No specific formula is provided in the law but the decision must be made by reference to the specific legal constraints, some of which are found in NFMA and many of which are in other statutes, and the opportunities for development of other uses under the MUSY concept. (It should be noted that the rationale of many of the specific statutory constraints is the promotion of important multiple-use values.)

The forest management system ultimately developed could provide for degrees of timber management intensity varying from complete passivity (providing esthetically pleasing vistas) to very active (intensive management practices designed to yield crops of timber or other forest products in as great a quantity as possible). If land is determined to be unsuitable for timber production, the alternative of management for timber production will be precluded for the immediate future or perhaps even the foreseeable future. Intermediate management intensities might be undertaken for "protection of other multiple-use values."²⁰ NFMA contains several provisions specifically designed to protect these multiple-use values that may limit the degree of timber management intensity. Most of them may be classified generally as limitations on the amount and manner of timber harvesting.

As a future check on the management system adopted in the plan, NFMA requires that any management technique used by the Forest Service be monitored (and presumably changed) if it is causing "substantial and permanent" impairment of the productivity of the land.²¹ The date provided by this monitoring of techniques should be included in the Program which guides the development of LMPs so that their regular revision at fifteen year intervals will integrate the findings of the monitoring. If the research, monitoring, and evaluation reveal that management techniques then in use are causing "significant changes" in the land's condition, specifically, impairment of productivity, the plan should be revised immediately.²²

(a) Timber-Sales Harvests

Timber harvests and sales will be completed from the NFS after the LMP for the unit becomes effective. At that time the planning team will have decided that the unit had lands which were suitable for timber resource management and that timber production was the proper use of some portion of the unit. In carrying out a timber harvest and sale, at least the following questions must be addressed:

- (1) how will which trees be removed from what area of the unit,
- (2) what advertisement will be provided and how will bids be taken,
- (3) what will the contract cover, and
- (4) what type and quality of roads are required.

The standards set out by Congress on these questions, in addition to sanitation, salvage harvests, and reforestation, are discussed in the following material.

Before a timber sale can actually be consummated through advertisement and contract, the method of harvest must be determined, size limits

on harvest areas must be established if even-aged management harvests are used, and the trees to be cut designated (either by identification of trees or by area). The method of harvest to be used for each timber sale should be set out in the LMP.²³ There are two basic methods of harvest: even-aged and uneven-aged. Even-aged harvests include primarily shelterwood, seed tree, and clearcutting.²⁴ Whichever method is selected must be appropriate for achieving other multiple uses.

Where clearcutting is proposed as the method of timber harvest, it must be the optimum practicable method. Optimum method as used in the NFMA means "the most favorable or conducive [method] to reaching the specified goals of the management plan."²⁵ Even-aged harvesting and management must be specifically subject to an interdisciplinary review if that method was not included in the plan for the unit when the plan was first implemented.²⁶ The other methods of harvest (uneven-aged management) have no special criteria to be considered in their selection.

Even-aged management techniques must be limited to a certain maximum size area to be cut in one harvest operation. This size limit is to be set on a unit of the NFS under NFMA "according to geographic areas, forest types or other suitable classifications."²⁷ Any even-aged management harvest technique must be the subject of an interdisciplinary review before the harvest takes place. This review must assess the potential environmental, biological, esthetic, engineering, and economic impacts of even-aged management on each particular sale area.²⁸ Even-aged management cut areas must be blended and shaped to fit the natural terrain to the extent practicable.²⁹

These limitations were adopted in response to environmental concerns and outdoor recreation groups. Congress has recognized that even-age timber management is a valuable tool and should be used on national forests, but its visible product (predominantly bare lands) should be minimized to preserve the natural appearance of the forests. Whatever method of harvest is selected for an area within a unit, the method selected must be based on considerations other than the method which yields the greatest return on investment or the highest output of timber.³⁰

In addition to the general limitations on clearcutting, NFMA contains provisions relating to a controversial timber management practice involving clearcutting: conversion of existing tree species in a forest to other species for economic or other reasons. Present Forest Service policy on stand conversion seems to vary from forest to forest. As a general proposition, a species most valuable for timber may not be the best suited for wildlife or recreation uses. Hardwood or mixed-species forests are more supportive of some forms of wildlife, but fast-growing softwoods as pine are of higher economic value.

In typically convoluted language, NFMA calls for regulations specifying guidelines which provide for steps to be taken within the objectives of an LMP to preserve the diversity of tree species similar to that existing in the region controlled by the plan "where appropriate, to the degree practicable."³¹ The Act also requires the Secretary to establish exceptions to the general prohibition against pre-maturity cuts for "particular species of trees" after multiple-use consideration and public participation. These provisions constitute something less than a ringing condemnation of stand conversion. They do reflect, however, that Congress was moved by public concern over the practice. In sum, the Act requires that if stand conversion is to be undertaken, it must be provided for in the LMP, thereby subjecting the conversion decision to multiple-use consideration and public participation.³²

Certain timber can be sold from NFS lands. The preliminary criteria for removal of timber is that the timber to be removed must have reached its "culmination of mean annual increment of growth."³³ How this decision is to be made has been left to the discretion of the Forest Service. Cubic measurement or other methods of measurement may be used. This limitation is not so strict that each tree to be cut must be measured; rather, it is permissible for a survey of an area to establish that the trees in the area have generally reached their culmination.³⁴ The NFMA changed the required degrees of designation of trees to be cut in a timber sale. The Organic Act of 1897 as interpreted in the Monongahela case required the marking of each tree to be cut. After passage of the NFMA, the Forest Service must only designate which trees are to be cut. Designation can be the marking of trees to be cut, marking those to be left, or in some manner showing the boundaries of the area to be cut.³⁵

"Culmination of mean annual increment of growth" was intended as a definition of maturity in the forests. Representative Brown, who introduced the language, said he wanted to include "this concept of maturity as being the age of the tree in which it has put on an additional volume, an increasing larger-volume of board feet of lumber each year."³⁶ The definition covers a "span of years" and was thought to allow greater timber production than the definition of maturity in the Monongahela case.³⁷ The then-Chief of the Forest Service, John McGuire, described the language as being forestry terminology that classed stands of trees as being mature where "annual additions to stand volume begin to taper off."³⁸ The Conference report adopting the House bill language, "mean annual increment of growth," indicated that the provision was a limitation on timber removal but still left discretion with the Secretary of Agriculture to determine the allowable sale quantity.³⁹ Earlier, the Senate Committee on Agriculture and Forestry had concluded "the Secretary should have flexibility to use the most efficient means available to assure the cutting of only trees he wants cut."⁴⁰

Although only certain timber can be removed from the national forests, the general authorization for the sale of trees, portions of trees, and forest products is quite comprehensive. The limitation is that "stands of trees throughout the NFS shall generally have reached the culmination of mean annual increment of growth."⁴¹ Even this limitation is tempered by the exception that the standard for harvest will not interfere with "sound silvicultural practices, such as thinning or other stand improvement measures."⁴² In effect, then, the limitation is that for general, large-scale timber sales, the Forest Service must not sell immature stands of trees.

At the time NFMA was being considered Congress was concerned about the products subject to timber sales from national forests. The Organic Act of 1897 allowed sale of "dead, mature, and large growth of trees." This general permission was repealed and replaced with the language "trees, portions of trees, or forest products."⁴³ This change achieved two goals. It allows the sale of trees without requiring that each portion of those trees be removed from the forest, and it allows the sale of forest products other than physiologically mature trees.⁴⁴ The Senate Committee saw a problem in the inability of the Forest Service to prepare and sell those forest products other than large trees or saw wood. The solution provided in NFMA is two-pronged.

First, the Secretary must develop "utilization standards, methods of measurement, and harvesting practices for the removal of trees, portions of trees, or forest products to provide for the optimum practical use of the wood material."⁴⁵ Utilization standards will be determined through consideration of "the opportunities for more effective wood utilization, regional conditions and species characteristics."⁴⁶ What Congress had in mind was that the scraps and chips generated from a typical timber harvest could in some cases be put to useful purposes. This would depend, however, on the available facilities to process the materials and the economics of transportation. The impact of such practices on the local or regional economy should also be considered.⁴⁷

Second, where the harvesting practices or utilization standards indicated by the Secretary are to be carried out, a deposit can be required from the purchaser to finance expenses of the Forest Service related to the sale. Those expenses may include road preparation (designing, engineering, and supervising construction, sale preparation, and supervision of harvest). This is a matter of procedure in consummating the timber sales which involve salvage or sanitation harvests only. This provision for advance deposits by timber purchasers is limited by the express language of the statute to harvests (or salvage) of "insect infested, dead, damaged or down timber."⁴⁸ But the crux of the subsection, the standards, methods, and practices to promote "optimum practical use of the wood material," is applicable to all timber sales.

The purpose of the advance deposits is a practical one; the deposits should enable the Forest Service to prepare and supervise sales of timber that is not of the highest quality or economic value. These sales have not been accomplished in the past mainly because of the absence of appropriations to design and construct roads to make the timber accessible.

Salvage harvests by themselves should improve resource protection and yield a more effective use of the timber resource. Provisions in NFMA and the new timber sale law relating to stand improvement also may help improve timber management in general. NFMA specifically authorizes "stand improvement measures" before timber has reached maturity.⁴⁹ The new timber sale provisions contain a statement that "to remove associated trees for stand improvement, the Secretary is authorized to require purchasers of such timber to make monetary deposits. . . ."⁵⁰

Accordingly, advance deposits may be required for removal of trees "associated" with salvage timber as a stand improvement measure. The common meaning of "associate" is to combine or join with others as component parts, or closely connected. Association is a term used in biology and related fields that means a "biotic community, any assemblage of populations living in a prescribed area or physical habitat."⁵¹ The legislative materials provide no further insight. In any case, stand improvement sales are permitted; if the sale is "associated" with a salvage harvest, a deposit may be required.

What has already emerged as one of the more controversial provisions of NFMA is the § 13 limitation on allowable sale quantity of timber to no more than "a quantity which can be removed from such forest annually in perpetuity on a sustained yield basis" with two exceptions: (1) the decade departure and (2) the within-any-decade departure.⁵² The general rule as to annual allowable sale quantity in the statute is an expression of an even-flow principle for the timber resource. Non-declining evenflow yield is Forest Service policy adopted pursuant to MUSY that provides for sustained yield. The NFMA provision makes that policy law. The purpose of the law is to ensure community stability and a continuous supply of timber in the future. The law also prevents rapid harvesting of old growth forests. Under some other criteria, the harvesting of an entire forest at one time might be feasible in western states. The main impact is that the Forest Service no longer has the discretion to use means other than non-declining evenflow to achieve sustained yield of the timber resource.

Community stability is aided by this policy since those economies dependent on logging and milling of timber will have available at least a minimum amount of their basic resource, timber. The boom and bust economic cycle experienced by lumber towns should be eliminated. This is especially true since the sustained yield provision is directed to be applied to each national forest.

The general rule of sustained yield allowable sale quantity is subject to two basic exceptions: the within-any-decade departure, and the decade departure. Within any decade, a greater quantity can be removed from a forest in one year if the quantity removed over the decade including that year does not exceed the long range quantity (the quantity allowed annually in the evenflow calculation times ten years).⁵³ For any ten-year period, the Secretary may increase the ten-year quantity subject to conditions not imposed on the within-any-decade departure.⁵⁴ The decade departure must be undertaken to achieve multiple-use objectives of LMP for the forest and must be made with public participation. The annual allowable sale quantity need not include the quantity of timber sold under salvage and sanitation harvest contracts.⁵⁵

Another exception for determining the annual allowable sale quantity is provided by NFMA. Two or more forests may be combined to determine the sustained yield "where a forest has less than two hundred thousand acres of commercial forest land."⁵⁶ This is an exception to the general principle that sustained yield is to be determined for each national forest. If one forest does not presently have the quantity of commercial forest land necessary to make a meaningful sustained yield calculation, the Forest Service should use only an adjacent or closely associated forest to add to the first forest for the sustained yield computation. Although not specifically required, to do otherwise (e.g., combine one forest in California and one in Colorado for the sustained yield computation) would not further the congressional purpose of promoting the stability of communities dependent on national forest timber.

The term "commercial forest land" is not defined in the NFMA. The Forest Service has defined commercial timber land as that land which is capable of producing at least 20 cubic feet of timber per acre a year. The phrase as used by Congress could mean this, but it also could mean land on which timber production is commercially feasible or economically practical. It could logically be interpreted to mean those lands on which timber is now being cut, which will be used for timber production in the ten-year period, or which would be likely to produce timber in the near future based on current planned management and proven management techniques. It is not clear from the language whether the forest having less than 200,000 acres of commercial forest land is to be combined with another like forest or forests or whether it could be combined with a forest having more than that amount of commercial forest land. An answer to this question and a determination of the meaning of "commercial forest land" are both relevant to the concept of "allowable cut effect."

The so-called allowable cut effect⁵⁷ is a concept that apparently has been given the congressional stamp of approval in NFMA. The Forest Service is allowed to raise harvest levels in the planning process based on predicted in-

creases in production from intensive management practices.⁵⁸ Thus, if a single forest contains second-growth stands or acreage containing second-growth stands can be added to the basic unit, the allowable cut may be increased by justifiable predictions concerning increased growth of those stands. The Act seeks to prevent spurious inflation of the annual allowable sale quantity through mere predictions of increased growth by requiring that harvest levels be decreased at the end of the planning period if the intensive management practices cannot be successfully implemented or continued substantially as planned.⁵⁹

The exceptions to the fixed annual allowable sale quantity reflect a compromise by Congress which arguably provides such wide leeway for major deviations that non-declining evenflow cannot fairly be claimed as the statutory policy.⁶⁰ At the center of the sustained yield (non-declining evenflow) controversy are the old growth forests. Adherents to a policy of old growth liquidation emphasize the hazards of fire, insect damage, and disease presented by the over-rotation age forests. Moreover, it is argued that the old growth sites present excellent opportunities for high production of timber. The liquidation policy involves what has been referred to as "overcutting" as opposed to "undercutting" for preservation purposes.⁶¹ A strict non-declining evenflow principle would be a significant obstacle to implementation of a liquidation policy.

A number of arguments can be made against a policy of liquidation (overcutting) of old-growth forests to establish second growth timber. Opponents of liquidation present eloquent arguments concerning the benefits of old-growth forests. They would limit cutting of many old-growth forests to "undercutting" whatever was necessary for preservation, but certainly not elimination. Proponents of maintenance of old-growth forests cite the benefits to each of the multiple-use values⁶² and the "impairment of the productivity of the land"⁶³ that is caused by elimination or drastic reduction of old growth. Specific statutory standards other than MUSY may provide constraints on cutting of old-growth stands. NFMA's requirements that plan guidelines provide for diversity of plant and animal communities and preservation of diversity of tree species is one example.⁶⁴ The Bald Eagle Protection Act of 1940⁶⁵ and the Endangered Species Act of 1973⁶⁶ could in certain instances preclude harvesting of old-growth timber.

A desire to improve age-class distribution and to reduce mortality losses in old-growth forests is the apparent force behind adoption of the discretionary departures from the projected long-term allowable sale quantity.⁶⁷ The result is a fallback to the familiar checks of multiple-use, public participation, and whatever constraints exist in other statutes.

(b) Advertisement and Bids

The actual sale of timber will be initiated by advertisement. Advertisement is not defined in

the NFMA. The law that was repealed by § 14 of NFMA required that "notice" of a proposed sale be published in a newspaper of general circulation in the state of the sale at least thirty days before the sale. This requirement was omitted in NFMA. Congress intended to give the Forest Service "greater flexibility in the length of time for advertising and in the means used."⁶⁸ The new requirements state that major timber sales must be advertised and that a prospectus of the sale "be available to the public and interested potential bidders."⁶⁹ Advertisement is not required when the appraised value of the sale is less than \$10,000 or some extraordinary conditions exist requiring a sale without advertisement. This exception to advertisement and the requirement that any sales must be for at least the appraised value of the forest products mandate that the value of the proposed sale be appraised before the sale process is initiated.

When a timber sale includes the construction of permanent roads which have an estimated cost of more than \$20,000, the "notice of sale"⁷⁰ must afford special options to certain potential purchasers. The estimated cost of the road must be given to "small business concerns," as defined under the Small Business Act, who wish to submit a bid. These small business concerns can elect to have the Forest Service build the road but must still pay the estimated cost of the road construction as a part of the timber sale price.⁷¹

The method of selecting a purchaser is left to the decision of the Forest Service. The implications of subsection e of 16 U.S.C. § 472a as passed in NFMA is that some form of bidding must be used.⁷² This implication was made a directive by the amendment in 1978 that replaced the subsection. The subsection now states "the Secretary of Agriculture shall select the bidding method or methods" which achieve enumerated purposes in the sale of forest products. The method selected must:

- A) insure open and fair competition;
- B) insure that the Federal Government receive not less than the appraised value . . . ;
- C) consider the economic stability of communities whose economics are dependent on such national forest materials, or achieve such other objectives as the Secretary deems necessary; and
- D) are consistent with the objectives of this Act and other Federal statutes.⁷³

If oral auction is to be used, there must first be a solicitation of written, sealed bids. Only those bidders whose sealed bids are equal to or greater than the appraised value can participate in the oral auction.⁷⁴

The reason for specifying bidding procedures is an attempt by Congress to prevent collusive bidding. As originally enacted, the directive was

simply to "take actions . . . to obviate collusive practices in bidding."⁷⁵ As detailed above, the method selected must achieve the specified purposes under the revised section. If collusive practices are suspected, the Secretary is now directed to inform the Attorney General of the United States and alter the bidding methods or take other actions necessary to eliminate the collusive practices.⁷⁶

(c) Contracts for Timber Sales

While the particular form of contracts for timber sales is not specified in the NFMA, several of the terms that must be included in most contracts are set forth. To provide a general directive for drafting contracts, Congress stated that the contract must be consistent with the LMP developed for that unit of the NFS.⁷⁷ The duration of a contract should not exceed ten years unless a longer period is needed to attain "better utilization of the various forest resources (consistent with the provisions of the Multiple-Use Sustained-Yield Act of 1960)."⁷⁸ Contracts of shorter duration are not precluded.

When a timber sale contract has a duration of at least two years, the purchaser must file a plan that will be followed in completing the harvest. The details of this plan are not specified in the statute, but the plan surely must include the method to be employed in harvesting. The method of harvesting will, of course, have to be consistent with the LMP which evaluated and stated the "probable methods of timber harvest."⁷⁹ The question of what must be in the plan of operation should be determined from the viewpoint of the Forest Service since the plan must be approved by the Secretary.

Considering the criteria which must be met to obtain an extension of a contract, the plan of operation may be required by the Forest Service to include a schedule of the operation to be completed. Extensions may be made by the Forest Service only if: (1) a delay has occurred as a result of some action of the United States or as a result of something beyond the purchaser's control; (2) the purchaser has diligently followed the plan of operation, or (3) "substantial overriding public interest justifies the extension."⁸⁰

Contracts for the purchase and sale of timber are subject to revision if they were in existence at the time the NFMA was enacted or when a LMP is adopted or revised. These revisions should be made "as soon as practicable" to make the contracts consistent with the LMP.⁸¹

Two points should be raised in connection with this statutory provision. First, since the mandate is explicit in the statute that the revisions must occur to attain consistency, all contracts with the Forest Service for use or occupancy of the forests are subject to such a revision whether or not the right to make the revision is stated in the contract. Second, the final clause of this

subsection could be a ground for litigation. It reads: "Any revision in present or future permits, contracts, and other instruments made pursuant to this section shall be subject to valid existing rights."⁸² If a revision must be made to a contract, it is possible that, unless caution is used, the purchaser may have a claim of harm from the revision and seek a set-off or other recovery.

(d) Reforestation

RPA/NFMA contains provisions on reforestation of NFS lands that are refinements of the primary mission of the Forest Service to produce a continuous supply of timber from the national forests. RPA as amended by NFMA initiated a period of intensive reforestation. RPA of 1974 set the year 2000 as the target date for elimination of the backlog of needed treatment for restoration of renewable resources.⁸³ But in NFMA Congress added a lengthy provision that set 1985 as the target for elimination of the backlog of lands in need of reforestation.⁸⁴ These disparate target years may be reconciled; the NFMA-added target date mandates elimination only of the timber backlog by 1985. The Forest Service is given until the year 2000 to accomplish needed restorative treatment for other renewable resources such as revegetation of rangeland. To accomplish this intensive reforestation project, Congress authorized appropriations of \$200,000,000 annually until 1984. The appropriation is to be used to "establish and improve growing forests to secure planned production of trees and other multiple use values."⁸⁵ These funds are in addition to moneys which are available for reforestation under other law. The directive to the Forest Service is first to identify lands which are cut-over, denuded, or deforested and which have stands of trees that are not growing at their best potential rate of growth. These lands are to be treated to attain the purposes stated above, in the period ending in 1984. Additionally, that quantity of land which is cut-over in each year of the period is to be replanted or treated.

The obvious premise of the intensive reforestation program is that, if the United States is to achieve a sustained yield of forest products from the national forests, the forests must be brought up to capacity and then maintained. Allowing lands which are cut-over in timber production to remain without a forest cover reduces the yield which will be available in the future and consequently reduces the quantity that can be harvested now under the sustained yield principle. Reforestation is essential to attain the ultimate goal of NFMA: a system of management of the national forests through which their full potential can be realized. The strong emphasis of reforestation in the Act implies a policy of utilization or maximization of timber production that appears to subordinate other interests in conflict with the concept of multiple use. But, as discussed elsewhere,⁸⁶ the sounder view is that the purpose of the intensive reforestation program is to achieve the optimum mix of multiple uses of the national

forests, one of which is timber production. In fact, NFMA mandates the level and type of treatment that will secure "the most effective mix of multiple use benefits."⁸⁷

The first step in the reforestation program is identification of lands in need of reforestation. In developing LMPs, the Forest Service is directed to identify those lands that are "not suited for timber production."⁸⁸ The Secretary, in turn, at the time the annual report on the Program and the budget are submitted is required to report on the reforestation needs indicated by the objectives of the LMPs.⁸⁹ Lands identified as not suited for timber production are to be considered backlog lands that are to be treated for reforestation and returned to "timber production" when they are "suitable."⁹⁰

The statutory mandate of NFMA requiring continued treatment of lands that are not suited for timber production on its face implies that all national forest lands will ultimately be managed for timber production. This, of course, could not be the case and certainly was not intended by Congress. Obviously, some national forest lands are incapable of producing timber and, even with advances in technology, realistically never will be. Perhaps because Congress thought it so obvious as not to require stating, reforestation treatment is not expected nor required on lands where such treatment would be absurd, such as mountain tops. Another category of land is that which technically may be capable of timber production but which has been determined in the planning process or otherwise to be suitable for production and protection of other resources and values. Congress has acknowledged the supportive role of timber in those instances and that reforestation treatment will be for a purpose other than ultimate timber production.⁹¹

Under the Act, however, all lands once identified as not suited for timber production, regardless of the reason, must be subjected to review at least every ten years to determine whether they have become suitable for timber production. This is consistent with the continuous reevaluation of NFS lands required under the NFMA planning process.

Treatment for restoration of renewable resources is to continue until one of three conditions is met: 1) the backlog of areas that will benefit from reforestation treatment is eliminated, 2) the cost of treating the remaining areas exceeds expected return (economic and environmental), or 3) total supplies of timber are sufficient to meet future demands of the United States.⁹²

Sections 1601(d)(1) and (2) of NFMA envision that reforestation will be completed on lands in the backlog by 1984. After this period the Forest Service still must report to Congress on the amount of funds necessary to reforest lands cut-over in a year "and to maintain planned timber production" to prevent a recurrence of a backlog of needed treatment. The purposes for which the funds are to be expended are to: secure seed, grow seedlings,

prepare sites, plant trees, thin, remove deleterious growth and underbrush, build fences to exclude livestock and adverse wildlife from regeneration areas, and otherwise establish and improve growing forests to secure planned production of trees and other multiple use values.

In carrying out the reforestation program, the Forest Service must examine the lands treated after the first and third growing seasons. This examination will include evaluations of stocking rate and growth rate as compared to the potential of these factors. If the treatment has not produced satisfactory results, the lands must be returned to the backlog and retreated. In pursuing reforestation, both under this intensive program and under LMPs, the Forest Service must provide for diversity of the plant and animal communities in the national forests and must, where appropriate and practicable, maintain the diversity of tree species existing in the area.⁹³

Funding for reforestation of the national forests can come from several authorizations other than that mentioned above. The authorization given in the Knutson-Vandenberg Act⁹⁴ is currently available. Timber purchasers can be required to pay for reforestation as part of the price of the timber sale.⁹⁵ Requiring such a payment must be qualified by a finding that the payment is "in the public interest."⁹⁶ These deposits by timber purchasers can include the costs to the Forest Service of replanting or sowing tree seeds (including acquisition of the seeds or trees), timber stand improvement, and protecting and improving the productivity of the renewable resources on the sale area.

An important aspect of the reforestation mandate is the necessity of generating complete information conveyed to the Secretary for inclusion in his annual reforestation report.⁹⁷ The availability of reforestation funds undoubtedly will be a factor in determinations of which alternative proposed and possible management activities are made a part of the LMP. Moreover, the ability of the land manager to implement the plan may depend heavily on the existence of reforestation funds. Unless the Secretary is provided with sufficient information concerning reforestation needs by both the planning and management personnel, the Secretary will be unable to provide Congress with an accurate estimate of the funds needed to fulfill the congressional mandate.

The question may be raised whether 1985 is a realistic date for elimination of the backlog of lands in need of reforestation. The estimates of the Secretary are to be based in part on the "objectives of land management plans," but incorporation of the new standards and guidelines into all LMPs may not be completed by 1985.⁹⁸ (The Secretary is required only to "attempt to complete such information" by September 30, 1985.) Existing land and resource management plans may provide some but not all of the information needed. Until such time as it has been determined how each forest ultimately will be managed under the new guidelines,

the types and levels of necessary reforestation treatment will be virtually impossible to determine.

NOTES

¹16 U.S.C. § 475 (1976).

²*Id.* See *United States v. New Mexico*, 438 U.S. 696 (1978).

³Pub. L. No. 94-588, 90 Stat. 2958, codified in part at 16 U.S.C. §§ 1600-14 (1976).

⁴See discussion of multiple-use sustained-yield, § A *supra*, p. . See also 16 U.S.C. § 1604(e)(1) which lists recreation, range, watershed, wildlife and fish, and wilderness.

⁵16 U.S.C. § 1604(f) (1976).

⁶See Chapter IV *infra*, p.

⁷The impetus for NFMA was the controversy surrounding the *Monongahela* decision that had blocked a Forest Service clearcut. See Hall & Wasserstrom, *The National Forest Management Act of 1976*, 8 ENV'T'L L. 523, 523-25 (1978).

⁸16 U.S.C. § 1604(c)(2) (1976).

⁹*Id.* at § 1604(g)(2)(A).

¹⁰*Id.* at § 1604(g)(3)(B).

¹¹*Id.* at § 1604(k).

¹²G. ELSNER, C. SCHWARZ, & E. THOR, *WILDLAND PLANNING GLOSSARY* 213 (USDA Forest Service Gen. Tech. Rep. PSW-13, 1976). The common meaning of suitability is "the quality or state of being suitable as in the compatibility or fitness." Suitable means "adapted to a use or purpose."

¹³In the business meetings on NFMA, the then Chief McGuire once referred to only 92 million of the 187 million acres in the NFS as "suitable for timber production," *infra* note 36 at 79, but at another point he referred to that 92 million acres as "available for timber production as commercial forest land." See also Letter from Chief McGuire in Senate Debate on S. 3091, Congressional Record, August 25, 1976, at S. 14532 where he states that the Forest Service considers lands to be "available for timber production when they have not been specifically withdrawn from timber production by congressional or administration action." "Suitability for timber production means capacity to produce crops of industrial wood." This classification is not dependent on whether it is "currently accessible"; "permanently inoperable land would be excluded."

¹⁴Section 219.12(b)(1)(ii) of the Final Regulations issued pursuant to § 6 of NFMA, 44 Fed. Reg. 53,986 (Sept. 17, 1979).

¹⁵See Final Regulation, §§ 219.12(b)(1)(iii) & (iv), 44 Fed. Reg. 53,986 (Sept. 17, 1979). It is based on 16 U.S.C. § 1604(g)(3)(E) (1976).

¹⁶Barlow, *Evolution of the National Forest Management Act of 1976*, 8 ENV'T'L L. 539, 546 (1978); Stoel, *The National Forest Management Act*, 8 ENV'T'L L. 549, 567 (1978).

¹⁷Barlow, *supra* note 16.

¹⁸16 U.S.C. § 1604(l)(1) (1976).

¹⁹SENATE CONFERENCE REPORT, S. Rep. No. 94-1335, 94th Cong., 2d Sess., at 28-29 (1976):

The Conferees understand that there may be other "pertinent factors" which the Secretary may consider in making the determination regarding the suitability of lands for timber production. The Conferees expect the Secretary to give appropriate consideration to such things as advances in logging techniques, improved genetic stock, or improved knowledge about the relationship between the resource components of the general land area. While this list is by no means exhaustive, the Conferees intend the Secretary to review and keep abreast of all developments in the field of forestry and its related sciences and to refer to these developments as necessary in making the determination required by this section.

²⁰16 U.S.C. § 1604(k) (1976).

²¹*Id.* at § 1604(g)(3)(C).

²²*Id.* at § 1604(f)(5).

²³The plan determines harvesting "levels," 16 U.S.C. § 1604(e)(2) (1976), and need not necessarily prescribe the method of harvest. But if it does not, a later proposed clearcut would likely require a revision of the plan. See text accompanying note 26 *infra*.

²⁴Since the early 1960s, most of the eastern national forests have used an even-aged system of timber management, which the Forest Service considers the most efficient system available. SHANDS & HEALY, *THE LANDS NOBODY WANTED* 28 (1977).

²⁵S. Rep. No. 94-893, 94th Cong., 2d Sess., at 39 (1976).

²⁶16 U.S.C. § 1604(g)(3)(F)(ii) (1976).

²⁷*Id.* at § 1604(g)(3)(F)(iv).

²⁸*Id.* at § 1604(g)(3)(F)(ii) (emphasis added).

²⁹*Id.* at § 1604(g)(3)(F)(iii).

³⁰*Id.* at § 1604(g)(3)(E)(iv).

³¹*Id.* at § 1604(g)(3)(B).

³²*Id.* at § 1604(m)(2).

³³*Id.* at § 1604(m).

³⁴This is consistent with 16 U.S.C. § 472a(g) which provides for "designation, marking when necessary, and supervision of harvesting of trees." (Emphasis added.)

³⁵S. Rep. No. 94-893, 94th Cong., 2d Sess. 42 (1976).

³⁶HOUSE COMMITTEE ON AGRICULTURE, BUSINESS MEETINGS ON THE NFMA OF 1976, August 3, 1976, at 194.

³⁷*Id.*

³⁸*Id.* at 195.

³⁹S. Conf. Rep. No. 94-1335, 94th Cong., 2d Sess. 32-33 (1976).

⁴⁰S. Rep. No. 94-893, 94th Cong., 2d Sess. 42 (1976).

⁴¹16 U.S.C. § 1604(m)(1) (1976) (emphasis added).

⁴²*Id.*

⁴³*Id.* at § 472a(a).

⁴⁴S. Rep. No. 94-893, 94th Cong., 2d Sess. 43 (1976).

⁴⁵16 U.S.C. § 472a(h) (1976).

⁴⁶*Id.*

⁴⁷S. Rep. No. 94-893, 94th Cong., 2d Sess. 42-43 (1976).

⁴⁸16 U.S.C. § 472a(h) (1976).

⁴⁹*Id.* at § 1604(m).

⁵⁰*Id.* at § 472a(h).

⁵¹WILDLAND PLANNING GLOSSARY, *supra* note 12, at 36.

⁵²16 U.S.C. § 1611 (1976).

⁵³*Id.* at § 1611(a).

⁵⁴*Id.*

⁵⁵*Id.* at § 1611(b).

⁵⁶*Id.* at § 1611(a).

⁵⁷See Fraser, *Sustained Yield Management: Economics and Evenflow*, 8 ENVT'L L. 343, 368-70 (1978).

⁵⁸16 U.S.C. § 1603(g)(3)(D) (1976).

⁵⁹*Id.* at § 1603(g)(3)(D)(ii).

⁶⁰Fraser, *supra* note 57, at 364-67.

⁶¹Behan, *Political Popularity and Conceptual Nonsense: The Strange Case of Sustained Yield Forestry*, 8 ENVT'L L. 309, 331 (1978).

⁶²Juday, *Old Growth Forests: A Necessary Element of Multiple Use and Sustained Yield National Forest Management*, 8 ENVT'L L. 497 (1978).

⁶³See 16 U.S.C. § 1604(g)(3)(C) (1976).

⁶⁴*Id.* at § 1604(g)(3)(B).

⁶⁵*Id.* at § 668.

⁶⁶*Id.* at §§ 1531-43.

⁶⁷S. Conf. Rep. No. 94-1335, 94th Cong., 2d Sess. [1976] in U.S. CODE CONG. & AD. NEWS 6721, 6735.

⁶⁸S. Rep. No. 94-893, 94th Cong., 2d Sess. 21 (1976).

⁶⁹16 U.S.C. § 472a (1976).

⁷⁰*Id.* at § 472a(i)(1). The Forest Service should follow the requirements of repealed § 476 as to notice. The only "notice of sale" in § 472a is the advertisement required in subsection d.

⁷¹16 U.S.C. § 472a(i) (1976).

⁷²The possible exception to bidding being a required method of selecting purchasers is where a public offering and advertisement have been made and no satisfactory bids were received. In such a situation or if a "bidder fails to complete the purchase, the sale may be offered and sold without further advertisement." 16 U.S.C. § 472a(d) (1976) (emphasis supplied). This is an exception to the general rule of bidding being required if "offered" is read to mean that the sale may be broached to a potential buyer rather than the public at large or even to the class of potential buyers.

⁷³16 U.S.C. § 472a(e) (Supp. II 1978).

⁷⁴Id. at § 472a(e)(2).

⁷⁵Pub. L. No. 92-588, § 14(e).

⁷⁶16 U.S.C. § 472a(e)(3) (Supp. II 1978).

⁷⁷The length and other terms of the contract shall be designed to promote orderly harvesting consistent with the principles set out in § 1604 of this title. 16 U.S.C. § 472a(c) (1976).

⁷⁸Id.

⁷⁹Id. at § 1604(f)(2).

⁸⁰Id. at § 472a(c). In the Senate debate on S.B. 3091, Senator Humphrey stated the intent of this section was to allow the Secretary to adopt a non-extension policy in the public interest regardless of performance. Cong. Rec. S. 14536 (Aug. 25, 1976). This provision reflects past Forest Service policy. Cong. Rec. S. 14500 (Aug. 25, 1976) (letter from Chief McGuire).

⁸¹16 U.S.C. § 1604(i) (1976).

⁸²Id.

⁸³Id. at § 1607.

⁸⁴Id. at § 1601(d).

⁸⁵Id. at § 1601(d)(2) (emphasis added).

⁸⁶See Multiple-Use discussion supra section a, p. 30.

⁸⁷16 U.S.C. § 1601(d)(1) (1976).

⁸⁸Id. at § 1604(k).

⁸⁹Id. at § 1601(d)(1).

⁹⁰Id. at § 1601(k).

⁹¹Id.

⁹²Id. at § 1607.

⁹³Id. at § 1604(g)(3)(B).

⁹⁴Id. at § 576a.

⁹⁵Id. at § 576b.

⁹⁶It is obviously in the public interest to reforest cut-over lands to provide future generations with a supply of timber; Congress has so stated. Id. at § 1601(d)(2).

⁹⁷Id. at § 1601(d).

⁹⁸Id. at § 1604(c).

2. Water and Soil

(a) Water Resource Development Legislation*

The purpose of the Flood Control Act of June 22, 1936,¹ was to control destructive floods upon rivers of the United States through federal cooperation with the states, political subdivisions, and localities for the initiation of investigations and improvements of rivers and other waterways, including the watersheds of such waterways. The benefits of such improvements must be in excess of the estimated costs in order that the improvement involve federal participation.²

Because Congress was concerned with the loss of lives and property and the obstruction of channels of commerce by such floods, the major portion of the Act is not applicable to the Forest Service functions. Two provisions of the Act, however, could be relevant to Forest Service planning and management. The Secretary of Agriculture can take emergency measures for run-off retardation and soil erosion prevention to protect lives and property when any watershed has been destroyed by fire or any other natural element.³ The maximum authorized expenditures per year are \$300,000 for those emergency purposes.⁴ Also, in designing or planning a project involving flood protection, the Forest Service must give consideration to non-structural alternatives to prevent or reduce flood damages. Such alternatives include "floodproofing" of structures, floodplain regulation, acquisition of floodplain lands for recreational, fish and wildlife, and other public purposes, and relocation with a view toward formulating the most economically, socially and environmentally acceptable means of reducing or preventing flood damages.⁵

The Watershed Protection and Flood Prevention Act of 1954⁶ was also enacted to promote cooperation between the federal government and state and local agencies in controlling floods. The emphasis of this Act, however, was "to prevent erosion, floodwater, and sediment damages in the watersheds of the rivers and streams of the U.S."⁷ This Act involves federal, state, and local participation in works of improvement to preserve and improve watersheds.⁸ The Act is administered by the Department of Agriculture, which has delegated the responsibility of carrying out the requirements of the Act to the Soil Conservation Service.⁹

The Act has no mandatory or authorized planning or management provisions which specifically affect the activities of the Forest Service. However, the President is authorized to issue rules and regulations for carrying out the purposes of the Act.¹⁰ Pursuant to this provision, the President issued Executive Order 10584 which contained language applicable to Forest Service activities.¹¹ The Secretary of Agriculture has the responsibility of "planning and installing works of improvement on lands under his jurisdiction."¹² But, the funds appropriated under this Act may not be used for

* The notes for subsection a begin on p. 41.

installing, operating, or maintaining land treatment measures on federal lands.¹³ Land treatment measures are defined as

construction . . . and management-type practices normally planned, installed, and maintained by individuals or groups of land users to efficiently use and protect the land and water resources. These measures serve to reduce runoff, erosion, and sediment that would restrict land use, adversely affect the environment, and reduce the realization of maximum benefits from existing and proposed measures. Land treatment measures include, but are not limited to, temporary and permanent vegetative plantings and establishments such as grass, trees, windbreaks, shrubs, and cover crops; establishing surface water disposal systems including waterways, terraces, diversions, and contour farming; water management measures including surface and subsurface farm drainage systems, efficient irrigation water distribution systems, land leveling, diversion dams and spreader ditches or dikes, irrigation tail-water recovery systems, holding ponds and tanks, catchment basins and water storage facilities; management measures including crop rotations, strip cropping, no-till or conservation farming, pasture management including fencing, wells, spring development or stock water ponds for livestock distribution and rotation grazing; and septic tanks, disposal lagoons and systems for recycling liquid livestock wastes to the land.¹⁴

In planning a watershed project, the Forest Service must determine that the benefits exceed the costs.¹⁵ A recent federal case has construed this section of the Act to require that in the planning of a multi-unit water resource project, only the entire project need have a cost/benefit ratio of greater than 1 to 1.¹⁶ Each unit of the multi-unit project is not required to have such a ratio before federal assistance is given to the project as long as each of the units is designed to protect a common floodplain.

The Forest Service should be aware of all existing water projects on a river or stream on which a work of improvement is contemplated.¹⁷ This Presidential mandate is a precursor of the Water Resources Planning Act of 1965.¹⁸ That Act resulted from a congressional desire to ensure the availability of water "to provide maximum benefits to all purposes--controlling floods and preventing pollution, providing water for domestic, municipal, and industrial use, and for irrigation, assisting irrigation, providing hydroelectric power and energy, and providing outdoor recreation opportunities and fish and wildlife conservation and enhancement."¹⁹ To achieve this availability

of water for all purposes, the major emphasis of the Act was the coordination of affected federal, state and local agencies, as well as private enterprise and other nongovernmental entities for the conservation, development, and utilization of water and related land resources.²⁰

The reference to "affected federal agencies" in the congressional statement of policy indicates that the Forest Service must be aware of any provisions in the Act applicable to its activities. The Act was not meant to affect the authority of the Forest Service in discharging its delegated responsibilities, except for the formulation and evaluation of federal water and related land resources projects.²¹

The Act created a coordinating body, the Water Resources Council (WRC),²² and provided authority for the President to create subordinate coordinating bodies, River Basin Commissions (RBC), as they were needed.²³ The Secretary of Agriculture is a member of the WRC.²⁴ The Forest Service should be aware of the powers and duties of these coordinating bodies, because any formulation or evaluation of federal water and related land resources projects by the Forest Service must conform to any plans, standards, and procedures promulgated by these coordinating bodies.²⁵ Under Executive Order 12113 all agencies must submit prior to final agency approval all proposals and pre-construction plans for federal and federally-assisted water and related land projects to the Office of Management and Budget.²⁶ This report must be accompanied by an impartial technical review conducted by the WRC.²⁷

The Forest Service still maintains the responsibility of preparing detailed plans and specifications for its own projects.²⁸ However, if such plans affect a river basin for which an RBC has been established, these plans must conform to the plan for coordinated development of water and related land resources prepared by the applicable RBC.²⁹ If it is determined by the President that the Forest Service has a substantial interest in the work undertaken by an RBC, a member of the Forest Service will be appointed to the commission at the time it is created.³⁰

The WRC is the central coordinating board for all RBC recommendations. It must evaluate the availability of water supplies over the nation and report to Congress and the President recommendations with respect to federal policies and programs relating to this water.³¹ More important to the activities of the Forest Service, the WRC must "establish principles, standards, and procedures for federal participants . . . for the formation and evaluation of Federal water and related land resource projects."³² Pursuant to this requirement, the WRC has promulgated the formula for computing the discount rate to be used in plan formulation and evaluation for discounting future benefits and computing costs. The interest rate to be used shall be based upon the average

yield during the preceding fiscal year on interest bearing marketable United States securities, which, at the time the computation is made, have terms of 15 years or more remaining to maturity. The rate shall not be raised or lowered over one-quarter of 1% for any year. The average yield shall be computed as the average during the fiscal year of the daily bid prices.³³

In addition to the mandatory coordination with the WRC and the RBC, the Forest Service is authorized to furnish any pertinent information and Forest Service personnel on a temporary, reimbursable basis to the RBC.³⁴ Also, the RBC is authorized to utilize Forest Service personnel as required to carry out the provisions of the Act.³⁵

The Act provides for Forest Service participation in the formation of the plans by the WRC and RBC for coordinated water projects. The Secretary of Agriculture is a member of the WRC which allows for communication between the Forest Service and the Council. Also, when submitting any recommendations to the President and the Congress, the views, comments, and recommendations of the affected federal agency also are submitted.³⁶ As a result of this provision of the Act, the Forest Service is assured that any views it has on recommendations for coordinated water projects which include rivers located in a national forest will be reviewed by the President and Congress before a final decision is made.

The placement of a member of the Forest Service on any RBC in which the Forest Service has a substantial interest assures that the Forest Service will participate in any planning by that Commission. Because the RBC is the basic planning body for coordinated water projects, the Forest Service will be able to participate in the promulgation of any plan affecting a national forest before the plan is submitted to the WRC for its approval.

The major emphasis of the Flood Control Act of June 22, 1936, the Watershed Protection and Flood Prevention Act, and the Water Resources Planning Act is the cooperation and coordination of the federal, state, and local governments in preventing the adverse effects of floods on the rivers and streams of the United States. Much of the language of the Acts is concerned with the details of cost sharing and management of these projects between political entities, and the terms which must be met in order for states and local entities to receive federal assistance. The Acts do not mandate any specific planning on the part of the Forest Service. However, provisions may be found in each Act which provide guidelines for federal agencies in providing for flood prevention. For this reason, the Forest Service should be aware of these applicable provisions in planning and managing flood control projects.

The Corps of Engineers Water Resources Project Act³⁷ was enacted to continue the national flood control policy initiated by the Flood Control Act of 1936 and extended by subsequent acts of Congress.³⁸

A provision of this Act, however, focuses on the use of water resource development projects for park and recreational purposes. The Secretary of the Army, as head of the Corps of Engineers, was given the authority to enter into leases of Corps' land with the local bodies and other governmental organizations to provide facilities for recreational purposes. However, the Act stated that preference was to be given federal, state, and local governmental agencies for any public purpose, if the Secretary of the Army determined that the proposed use was in the public interest.³⁹

Any federal agency, including the Forest Service, may receive a license or lease from the Secretary of the Army in order to develop or conserve fish, wildlife, forests, or other natural resources. Those agencies are authorized to cut timber and harvest crops and to use the proceeds from the sale of those resources for development, conservation, maintenance, and utilization of the leased lands.⁴⁰

An amendment to the Corps of Engineers Act granted the Secretary of Agriculture the authority to amend any lease entered into with respect to lands under the jurisdiction of the Forest Service for construction, maintenance, and operation of commercial facilities at a federal reservoir project.⁴¹ The statute is not clear as to what lands are actually included, but it apparently refers only to lands at federal water projects originally under the jurisdiction of the Forest Service and those lands that are under Forest Service jurisdiction through leasing arrangements with the Corps of Engineers. The adjustment of the lease can affect the amount of rental owed to the United States if the Secretary of Agriculture determines an adjustment is in the public interest. The adjustment cannot be retroactive to any period of commercial use prior to the adjustment date.

Pursuant to the Corps of Engineers Water Resources Project Act, the Secretary of the Army and the Secretary of Agriculture may jointly regulate a recreational area at a federal water project if they agree that such joint regulation of the facility is in the best interest of the public and will not interfere with the primary purpose of the project.⁴² Presently, the only such jointly regulated facility is the Sam Rayburn Reservoir Area on the Angelina River in Texas.⁴³ The authority of each agency is specifically defined, with the Forest Supervisor having jurisdiction over (1) the National Forest lands in the project area not previously assigned to the Corps of Engineers and (2) any Corps of Engineers lands specifically assigned to the Forest Service.⁴⁴

Rules and regulations have been promulgated jointly by the two agencies for the Sam Rayburn Reservoir Area.⁴⁵ Recreation use fees were established pursuant to the Land and Water Conservation Fund Act of 1965.⁴⁶

Although the Corps of Engineers Water Resource Project Act authorized the construction, maintenance,

and operation of park and recreational facilities at water resource development projects, those facilities may not have been considered in the planning stage of the water project. The Federal Water Project Recreation Act of 1965⁴⁷ mandated that full consideration be given to outdoor recreation and fish and wildlife enhancement during the planning stage of any federal navigation, flood control, reclamation, hydro-electric, or multiple-purpose water resource project.

The Corps of Engineers Water Resource Project Act provided for non-federal involvement in the development of recreational facilities at federal water projects. However, it did not specify a uniform system to be used as a guideline for the coordination of activities between federal interests in charge of the water project and non-federal interests. A major purpose of the Federal Water Project Recreation Act of 1965 was to coordinate federal water resource projects with needed recreation facilities and fish and wildlife protection and development by providing standard policies and procedures relating to cost allocation, reimbursement, and cost-sharing between the federal and non-federal interests.⁴⁸

The 1965 Act provided that, unless the area was to be included in a national recreation area or was appropriate for federal administration, project construction agencies should encourage non-federal administration of the project lands and water areas for recreation and fish and wildlife enhancement purposes.⁴⁹ In this way the Federal Water Project Recreation Act is supplementary to the Land and Water Conservation Fund Act of 1965, which also mandated non-federal involvement in recreation projects.

The legislative history of the Act indicates that its provisions were initially applicable only to the Department of the Interior and Department of the Army.⁵⁰ The Act provided for cost-sharing of recreation and fish and wildlife enhancement of these water resource projects between the federal government and non-federal interests, and the administration of the water project for these secondary purposes by the non-federal interests. However, the legislative history and the Act itself indicate that areas to be included in a national recreation area or areas appropriate for federal administration cannot be administered by a non-federal interest.⁵¹ For this reason, any water project constructed in a national forest with facilities for recreation and fish and wildlife enhancement must be administered by the Forest Service.

Although the Act may not be directly applicable to the activities of the Forest Service, several provisions are relevant to Forest Service planning and management. In the event that the Forest Service undertakes the construction of a water resource project for one of the specified purposes (federal navigation, flood control, reclamation, hydro-electric or multiple-purpose water resource projects), it must consider the potential for outdoor recreation and fish and wildlife enhancement.⁵²

Pursuant to the Land and Water Conservation Fund Act of 1965,⁵³ entrance and user fees were established for national forests and certain of their facilities. These fees also apply to water project facilities constructed by the Forest Service and those existing facilities which the Forest Service has developed for recreation and fish and wildlife purposes. These facilities must conform to guidelines established for charging entrance and user fees.⁵⁴

Several provisions of the Act deal with the administration of land which contains reservoirs with recreation and fish and wildlife developments. The Chief of the Forest Service must consent to the use of any national forest lands for any recreation or fish and wildlife purposes.⁵⁵

The Act specifically provides that if a project reservoir area is located within the exterior boundaries of a national forest, such project lands must be transferred to the jurisdiction of the Forest Service, unless the Secretaries of Interior and Agriculture determine otherwise.⁵⁶ The Secretary of Interior may transfer jurisdiction over project lands within or adjacent to the exterior boundaries of national forests to the Secretary of Agriculture for recreation and other national forest system purposes.

Even though the project area may not be contiguous with a national forest area, transfer of project lands if authorized by the Act, either by lease agreement or exchange, if Forest Service administration of the water projects having recreation and fish and wildlife developments is in the public interest.⁵⁷ However, the Secretary of Interior must administer the lands and water which are needed or used for the operation of the primary purpose for the water project.⁵⁸

These two Acts, although not dealing directly with Forest Service planning and management, contain provisions that must be considered by the Forest Service in its development of recreation facilities at federal water projects. The Forest Service must be aware of the applicable provisions in the Acts which provide for interaction between the Forest Service and other federal agencies in constructing, maintaining, and operating recreational areas and facilities at federal water projects. Also, the Forest Service must establish user fees at these recreational areas pursuant to the guidelines promulgated under the Land and Water Conservation Fund Act of 1965. Finally, the Forest Service is authorized to assume management of federal water project areas developed for recreational purposes if that control is in the best public interest. If any federal water project is wholly within a national forest, the Forest Service must assume the operation and maintenance of the recreation area.

NOTES

¹³³ U.S.C. §§ 701a, 701b, 701b-1, 701b-2, 701b-6, 701b-7, 701c, 702a-10 (1976).

²Id. at § 701.
³Id. at § 701b-1.
⁴Id.
⁵Id. at § 701b-11(a).
⁶16 U.S.C. §§ 1001-09 (1976).
⁷Id. at § 1001.
⁸Id.
⁹7 C.F.R. 1005 (1978).
¹⁰16 U.S.C. § 1005 (1976).
¹¹Exec. Order No. 10,584, 19 Fed. Reg. 8725 (1954) as amended by Exec. Order No. 10,913, 26 Fed. Reg. 510 (1961).
¹²Id. § 2(e).
¹³7 C.F.R. § 622.54 (1978).
¹⁴7 C.F.R. § 620.22 (1978).
¹⁵16 U.S.C. § 1005(1) (1976).
¹⁶Concerned Residents of Buck Hill Falls v. Grant, 537 F.2d 29, 36-37 (3d Cir. 1976).
¹⁷Exec. Order No. 10,584, § 6(b), 19 Fed. Reg. 8725 (1954).
¹⁸42 U.S.C. §§ 1962, 1962-1, 2, 1962a, a-1, a-2 to a-4 (1976).
¹⁹H.R. Rep. No. 89-169, 89th Cong., 1st Sess., reported in [1965] U.S. CODE CONG. & AD. NEWS 1921, 1922-23.
²⁰42 U.S.C. § 1962 (1976).
²¹Id. at § 1962-1(b).
²²Id. at § 1962a.
²³Id. at § 1962b.
²⁴Id. at § 1962a.
²⁵Id. at §§ 1962a-2, 1962b.
²⁶Exec. Order No. 12,113, § 1-105, 44 Fed. Reg. 1955 (1979).
²⁷Id. at §§ 1-104, 1-106.
²⁸H.R. Rep. No. 89-169, supra note 19 at 1922.
²⁹42 U.S.C. § 1962b(2) (1976).
³⁰Id. at § 1962b-1.
³¹Id. at § 1962a-1.
³²Id. at § 1962a-2. See also 18 C.F.R. § 701.4 (1978).
³³18 C.F.R. § 704.39 (1978).
³⁴42 U.S.C. § 1962b-4 (1976).
³⁵Id. at § 1962d-3.
³⁶Id. at § 1962a-3(b).
³⁷16 U.S.C. §§ 460d, d-2 (1976).
³⁸H.R. Rep. No. 78-1309, 78th Cong., 2d Sess., reprinted in [1944] U.S. CODE CONG. & AD. NEWS 1349, 1353.
³⁹16 U.S.C. § 460d (1976).
⁴⁰Id.
⁴¹Id. at § 460d-2.

⁴²36 C.F.R. 313 (1978).
⁴³Id. at § 313.1.
⁴⁴Id. at § 313.2.
⁴⁵Id. at §§ 313.4, 313.20.
⁴⁶16 U.S.C. §§ 460l-4 et seq. (1976); 36 C.F.R. § 312.21(e) (1978).
⁴⁷16 U.S.C. §§ 460l-12 to 21 (1976).
⁴⁸H.R. Rep. No. 89-254, 89th Cong., 1st Sess. reprinted in [1965] U.S. CODE CONG. & AD. NEWS 1864.
⁴⁹16 U.S.C. § 460l-12(e) (1976).
⁵⁰H.R. Rep. No. 89-254, 89th Cong., 1st Sess. reprinted in [1965] U.S. CODE CONG. & AD. NEWS 1864, 1866-67.
⁵¹Id. at 1271. See also 16 U.S.C. § 460l-12(a) (1976).
⁵²16 U.S.C. §§ 460l-12(c), 460l-17(d) (1976).
⁵³Id. at § 460l-4 to 11.
⁵⁴36 C.F.R. § 219.9 (1978); 43 C.F.R. § 18.1 et seq. (1978).
⁵⁵16 U.S.C. § 460l-18(c) (1976).
⁵⁶Id.
⁵⁷Id. at § 460l-18(b).
⁵⁸Id. at § 460l-18(c).

(b) Water Pollution Legislation*

In 1972 Congress enacted the Federal Water Pollution Control Act Amendments,¹ drastically changing the shape, design, and goals of both the federal and state efforts to clean up the nation's waterways. In 1977 Congress made some mid-course corrections in that pioneering effort through the passage of the 1977 Clean Water Act.² In both statutes there are several important provisions which have a direct impact on the Forest Service planning and management efforts.

The Clean Water Act (CWA) utilizes a tri-partite scheme in order to achieve fishable and swimmable waters by 1983. As originally instituted in 1972 the Clean Water Act first used effluent standards to control point source pollution imposing a requirement of Best Practicable Control Technology (BPCT) currently available to be in place by 1977³ and Best Available Control Technology (BACT) economically achievable to be installed by 1983.⁴ Second, water quality standards set by the states governed the quality of the waters within their boundaries and could not be violated even if the point source was utilizing BPCT.⁵ Third, the entire point source program was governed by the National Pollutant Discharge Elimination System (NPDES), which required that each point source receive an NPDES permit before any discharges would be allowed.⁶ Lastly, the 1972 Act tries to deal with the problem of non-point sources of water pollution through § 208.⁷

* The notes for subsection b begin on p. 50.

A major part of the 1972 Act's emphasis was on municipal treatment plants and the need for secondary treatment on all wastewater plants.⁸ The 1972 Act provided a substantial amount of federal monies for such a construction program.

There are three major programs created by the 1972 Act and amended by the 1977 Act which have a direct impact on both Forest Service planning and management. They include: (1) NPDES permit requirements for all Forest Service point source discharges; (2) Section 208 planning and management requirements for all non-point sources including silvicultural activities; and (3) Section 404 Corps of Engineers dredge permits for the regulation of dredging operations in defined "wetlands."

Point Source Discharges--Under § 301 the discharge of any pollutant into the waters of the United States from a point source is prohibited unless otherwise authorized by the CWA.⁹ The CWA defines several of these key words which, when taken in toto, provide a broad and far-ranging control over most discharges of pollutants. Initially pollutants are defined to include:

dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water.¹⁰

A point source also is defined very broadly to include:

. . . any discernible, confined and discrete conveyance including but not limited to any pipe, ditch, channel, tunnel, conduit, well discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft¹¹

The CWA has been held to govern almost all waters of the United States whether they would fit under the traditional test of navigability or not, with the court relying not on the navigation clause but on the Commerce Clause to justify such a broad interpretation.¹²

All point source dischargers are subject to a dual set of requirements: effluent standards for existing sources developed under § 301¹³ and water quality standards developed by the states, which vary depending on the nature of the intended use of the receptor water body.¹⁴ In addition, new sources of pollutants must meet the effluent standards promulgated by the Administrator of the Environmental Protection Agency under § 306.¹⁵ For existing sources all discharges had to achieve BPCT by July 1, 1977, in order to qualify for an NPDES permit.¹⁶ Under the 1972 Act all point source dischargers had to achieve BACT by July 1,

1983.¹⁷ The Administrator was given the responsibility of defining on an industry-by-industry basis what numerical limits would be required under BPCT and BACT definitions.¹⁸ The 1977 Act basically retained the 1972 framework but with some changes to take into account the reality of non-compliance by the initial 1977 BPCT deadline.

For the approximately 10-15% of the major point source dischargers that were not complying with the 1977 BPCT deadline, the 1977 Act allowed some limited relief. Congress authorized extensions from the 1977 BPCT deadline in three different situations.¹⁹ The first allows an extension where the point source was planning to discharge into a publicly-owned treatment work (POTW), but for any of several reasons the POTW cannot receive the discharge.²⁰ An exception is also provided for point source discharges into receiving waters.²¹ The required findings for this second exception are four-fold: (1) the discharger must have acted in good faith to meet the 1977 deadline; (2) there must be a commitment of resources to achieve compliance as soon as possible, but no later than April 1, 1979; (3) the discharger must have applied for an NPDES permit prior to December 31, 1974; and (4) the facilities needed to comply must be under construction.²² The third extension allows the Administrator to delay compliance through July 1, 1983, if the Administrator determines (with the concurrence of the POTW operator) that discharge into a POTW is the most appropriate means of compliance and the discharger cannot receive the 1979 POTW extension requirements.²³

One important limitation that was contained in the original 1972 bill and carried forward in the 1977 Act was that, regardless of the effluent standard imposed upon the point source discharger, in no event was the discharge to be allowed if it would cause a violation of the state-set water quality standard for the receptor waters.²⁴ These water quality standards are to be met by the states.²⁵ In the event of a state's failure to promulgate water quality standards the EPA will promulgate the applicable water quality standard.²⁶

The 1983 deadline for installing BACT was moved back to July 1, 1984 by the 1977 CWA.²⁷ Additionally, the 1977 CWA changed the effluent standard for conventional pollutants from BACT to "best conventional pollutant control technology" or BCT.²⁸ Congress intended to concentrate on controlling discharges of toxic pollutants while relaxing the requirements of conventional pollutant control.²⁹ The conventional pollutants include biological oxygen demand (BOD), suspended solids, fecal coliform, and pH.³⁰

The 1977 CWA attempted to isolate and treat as a separate problem the issue of toxic pollutant point source discharge and was spurred on by litigation concerning the degree of control needed over these toxic pollutants.³¹ In *NRDC v. Train*³² the court identified 65 toxic pollutants and ordered the EPA to broaden the list where necessary.

Congress then imposed the requirement that all toxic pollutants be subject to BACT requirements no later than July 1, 1984.³³ The EPA will be promulgating effluent limitations setting BACT levels for these toxic pollutants.³⁴

Because not all pollutants will fit under either the definition of a toxic pollutant or a conventional pollutant, Congress created a third category of "nonconventional pollutants" for which the Administrator must establish BACT limitations by July 1, 1984, and point source dischargers must comply with such standards by July 1, 1987.³⁵

The Administrator thus is responsible for issuing effluent guidelines and standards which must be met before an NPDES permit allowing a discharge is issued. Under the 1972 Act the EPA also was given the initial authority to issue NPDES permits although the EPA was authorized to transfer that authority to states which met minimum statutory and administrative criteria.³⁶ By mid-1979 the NPDES issuance authority had been delegated to approximately 32 states. A recent decision of the Seventh Circuit Court of Appeals has placed in jeopardy EPA's delegation of NPDES authority to almost all of those 32 states. In Citizens for a Better Environment v. EPA³⁷ the plaintiffs challenged the delegation of NPDES authority to Illinois. The court found that the EPA had not specified guidelines for states to follow in allowing public participation in state NPDES enforcement procedures.³⁸ Specifying guidelines was required by two sections of the CWA which the court interpreted to reflect a congressional intent to encourage and require public participation.³⁹ Since the Administrator had only published general, non-mandatory guidelines, the court ordered the withdrawal of NPDES authority from Illinois. Thus, Forest Service officers must be aware of the status of NPDES authority for their state, including the possibility of active litigations affecting the permit issuing agency.

Section 313 of the CWA originally required all federal agencies to "Comply with Federal, state, interstate and local requirements respecting control and abatement of pollution to the same extent that any person is subject to such requirements."⁴⁰ The states of California and Washington applied to the Administrator for authority to administer their own NPDES permit system.⁴¹ Included within their requests was the authority to issue and set conditions on NPDES permits from federal facilities operating within their states. The Administrator in response to these requests withheld the authority from the states to impose an NPDES permit requirement on any federal facility discharging into the waters of either state.⁴²

Litigation ensued, and, in the companion case to Hancock v. Train⁴³ dealing with the identical issue in the Clean Air Act, the United States Supreme Court held in EPA v. State Water Resources Control Board⁴⁴ that Congress had not authorized a state agency to require the federal government to meet the procedural requirements mandated by the

1972 Act, including the right to demand an application for an NPDES permit.⁴⁵ The Supreme Court acknowledged that the federal facilities were bound by the effluent limitation requirements that had been promulgated by the EPA, but that without a clearer statement of intent they would not be bound to meet the procedural requirements of the statute.⁴⁶

The 1977 CWA, much like its counterpart in the air pollution field, provided just such an explicit statement of congressional intent.⁴⁷ The 1977 CWA provides that all federal agencies must comply with all procedural and substantive requirements imposed by state, interstate, or local governments and specifically included the payment of renewable service charges as one of the newly mandated duties.⁴⁸ The only exemption from this blanket statement of federal compliance is that the President may exempt certain military facilities on a three-year basis if an exemption is in the interest of national defense.⁴⁹

Because silvicultural activities do not fall into a neat category, i.e., point or non-point source, the Administrator while promulgating regulations for governance of the NPDES system attempted to exclude certain of these hybrid point sources from the NPDES requirement, preferring to deal with these activities as non-point sources falling under the § 208 requirements.⁵⁰ Litigation ensued and, in the case of Natural Resources Defense Council, Inc. v. Train,⁵¹ the Administrator was ordered to promulgate effluent standards and require NPDES permits for silvicultural activities that ended up with a point source discharge.⁵² The proposed regulations had promulgated effluent standards but had relieved silvicultural activities from the obligation of seeking an NPDES permit.⁵³ The exemption would not apply if the state water pollution control agency identified that particular source as a significant contributor of pollution.⁵⁴ The EPA has argued that silvicultural activities were not amenable to "end-of-pipe" technology in order to reduce pollution but were better suited to "process charges" which were more suitable for regulation under the non-point source program.⁵⁵

The court read the legislative history of the 1972 Act and its predecessor, the Rivers and Harbors Act, as supporting the plaintiff's contention that all point source discharges were intended to be covered by an NPDES permit. Therefore the blanket exemption of classes of point sources was without legislative authority.⁵⁶ The court ordered the Administrator to include all point sources in the NPDES program but allowed the Administrator to carefully review the type and nature of silvicultural activities to put them in either the point or non-point category thus eliminating the alleged fear that every culvert or logging road would be treated as a point source needing an NPDES permit.⁵⁷

The Administrator responded to the court order by promulgating a set of regulations delineating both the effluent standards that had to be met

and the NPDES permit requirement that had to be sought for silvicultural point sources.⁵⁸ The process calls for a case-by-case determination as to whether any silvicultural operation is a point or non-point source.⁵⁹ At the same time the Administrator also defined a silvicultural point source to be:

any discernible, confined and discrete conveyance related to rock crushing, gravel washing, log sorting or log storage facilities which are operated in connection with silvicultural activities and from which pollutants are discharged into navigable waters.⁶⁰

These operations would be subject to the NPDES permit requirement.

In an additional comment the Administrator sought to exclude such traditional silvicultural activities as nursery operations, site preparation, reforestation and subsequent cultural treatment, thinning, prescribed burning, pest and fire control, harvesting operations, surface drainage, and road construction and maintenance from which precipitation runoff results from the point source category.⁶¹ A further caveat was added by the Administrator for certain activities such as stream crossings for roads which may involve either a point source discharge, for which an NPDES permit must be obtained, or an activity for which a § 404 dredge and fill permit would be required.⁶²

For "rock crushing and gravel washing facilities," which are defined as those which process crushed and broken stone, gravel, and riprap, the effluent limitations are contained in the mining and mineral processing section.⁶³ The BPCT effluent limitations are for process generated waste water pollutants from facilities that recycle waste water refuse in processing the total suspended solid 45mg/l maximum for 1 day and 25mg/l average for 30 consecutive days.⁶⁴ The maximum pH for any one day cannot fall outside the 6.0-9.0 range.⁶⁵ All other discharges of process generated waste water including those commingled with waste water in a pit, pond, lagoon, or other holding area into navigable waters is prohibited.⁶⁶ Mine dewatering discharges must not exceed the 45mg/l total suspended solids for a one day maximum and 25mg/l as an average for daily values for any 30 day consecutive period.⁶⁷ Similarly the allowable range of pH is 6.0-8.0 on a daily maximum basis.⁶⁸ Overflow from a facility designed to withstand the 10-year 24-hour rainfall is excluded from the effluent guidelines.⁶⁹ In addition, if the receiving waters in a natural condition would have a pH of less than 6.0, then the pH range would be lowered to 5.0.⁷⁰

The second major category of silvicultural activities for which an NPDES point source permit must be sought is "log sorting and log storage facilities."⁷¹ They are defined to include those facilities wherein "Discharges result from the holding of unprocessed wood, i.e., logs or roundwood

with bark or after removal of bark in self-contained bodies of water (mill ponds or log ponds) or land storage where water is applied intentionally to the logs (wet decking)."⁷²

The applicable effluent limitations are obtained in the Timber Products Group, Log Washing Subcategory.⁷³ The effluent limitation guidelines for the definition of BACT to be achieved by 1984 unless amended by the Administrator by virtue of the 1977 CWA is that there shall be no discharge of processed waste water pollutants to navigable waters.⁷⁴ If a logwashing operation discharges into a publicly owned treatment work, no pollutant can be introduced which will interfere with the performance of the POTW.⁷⁵ Thus pollutants which create a fire or explosion hazard, or will cause corrosive structural damage, or lower the pH below 5.0 cannot be discharged.⁷⁶ Solid or viscous pollutants in amounts which would cause obstruction to the flow of sewers or pollutants which have a float rate which is excessive over short periods of time are also prohibited.⁷⁷ There are no specific limitations for BOD, TSS, or pH other than that contained for existing sources which feed into a POTW.⁷⁸ For all new log washing operations there can be no discharge of process water pollutants to navigable waters.⁷⁹ For new sources discharging into a POTW the general regulations regarding pretreatment of waters is applicable to log sorting or log storage facilities.⁸⁰ Therefore new sources cannot discharge pollutants causing fire or having explosion hazards or those which will cause structural damage by containing a pH of less than 5.0 or those which are in solid or viscous form and would cause obstructions to the flow in sewers to POTWs. Furthermore no pollutants including BOD can be discharged which would interfere with the operation of the POTW.

In addition to the two categories of silvicultural point sources just discussed, the EPA, in response to the NRDC opinion,⁸¹ developed a general permit program.⁸² Although originally restricted to irrigation return flows and separate storm sewers,⁸³ the EPA in the most recent changes in the NPDES regulations expanded the coverage of the general permit program.⁸⁴ Under this program either the Regional Administrator or responsible state official can create a "general permit program area" (GPPA).⁸⁵ These GPPAs shall usually correspond with § 208 or § 503 planning areas, local districts, state or local boundaries, or SMSAs.⁸⁶ Once designated, any category of point sources operating in a GPPA can be eligible for a general permit if the category involves substantially similar operations, discharges the same types of wastes, requires the same effluent limitations and sanitary system, and in the opinion of the Regional Administrator or responsible state official, is appropriately controlled by a general permit.⁸⁷ All draft general permits must be sent to the EPA Deputy Assistant Administrator for Water Enforcement during the mandated public comment period.⁸⁸ Each general permit shall cover all areas of the designated category of point sources within the GPPA and shall be subject to the conditions and

limitations on the general permit.⁸⁹ Either the Regional Administrator or responsible state official may revoke a general permit if (1) the covered discharges are a significant contribution to water pollution; (2) the discharger is not in compliance; (3) a technological change has occurred regarding the point source discharge; (4) effluent limitations are promulgated for the category of point sources; (5) a § 208 plan containing other requirements is approved; or (6) the circumstances have changed so that a general permit is no longer appropriate.⁹⁰ The EPA may revoke a general permit which it has issued if it determines that an NPDES permit is more appropriate after an on-site inspection and the owner in question has been notified of that determination.⁹¹

In addition to the Forest Service having to seek an NPDES permit for any activities involving a point source discharge into a navigable water, the CWA also addresses the problem of regulating the activities of federal permittees or licensees. All applicants for a federal license or permit whose activities will result in a discharge into navigable waters must provide the federal agency with a state certification that the discharge will comply with the requirements of the CWA.⁹² These requirements include any relevant effluent limitation guidelines or water quality standard based guidelines.⁹³ No NPDES permit can be issued by the EPA without this certificate.

The EPA has promulgated regulations dealing with the process to be followed by federal agencies and licensees in getting state certification.⁹⁴ If an application is received by the EPA which does not have a state certification, the Regional Administrator shall forward the application to the relevant state. The state has 60 days to respond to the application, and if the state fails to act it is deemed to have waived its certification rights.⁹⁵

The state certification must include the terms and conditions which will result in compliance with the applicable provision of § 208(c) (non-point source control), § 301 (effluent limitation guidelines), §§ 302 and 303 (water quality-based effluent guidelines), § 316 (new source performance standards), and § 317 (toxic substances effluent standards).⁹⁶ If the state is reviewing a draft permit, it must document the state law which is the basis for the more stringent standard. Also, if the state in reviewing a draft permit wants to impose less stringent conditions, it must document why the less stringent condition will not violate any state water quality or other standard.⁹⁷

If certification is denied by the state or the final permit does not incorporate the state imposed conditions, no NPDES permit can be issued to the federal licensee.⁹⁸ A state cannot condition on the imposition of a less stringent condition certification on the imposition of a less stringent condition than that required by the EPA. If a state attempts to do so it will be denied a waiver and the permit may be issued. The regulations also provide for special certification procedures in cases involving discharges into POTWs.¹⁰⁰

To summarize, the Forest Service is now required to apply for an NPDES permit from either the authorized state or the EPA before it can discharge any pollutant into receiving waters. The NPDES issuing agency can place any condition it desires on the permit. At a minimum the Forest Service will have to meet either EPA or state-set effluent limitations, whichever are more stringent. In no event will the discharge be allowed to violate the state or federal water quality standards for the receiving waters. In addition, if the Forest Service or its licensees are engaging in certain types of silvicultural activities on NFS land that are included within the definition of a point source and fall within one of the two enumerated categories, they will have to meet the EPA-promulgated effluent standards as well as filing a Short Form C application for an NPDES permit. Finally, all applicants for Forest Service permits or licensees have to get a state certification before the EPA may issue an NPDES permit for activities involving point source discharges.

Hydrologic Modification and Wetlands Preservation Through the Control of Dredge and Fill Activities--Section 404.

--The 1972 Act attempted to broaden the protection of national waterways by replacing the Corps of Engineers' authority to control dredge and fill operations under § 10 of the Rivers and Harbors Act of 1899¹⁰¹ with new and expanded regulatory authority under § 404 of the Clean Water Act.¹⁰² Section 404, as originally worded, authorized the Secretary of Army, through the Corps of Engineers, to issue permits after notice and opportunity to be heard for the "discharge of dredged or fill material into the navigable waters at specified disposal sites."¹⁰³ The Administrator, pursuant to § 404(b) was to develop guidelines to govern the substantive review of dredge and fill discharges.¹⁰⁴

The 1972 Act attempted to expand greatly the territorial scope of coverage for discharges of dredged or fill material. The discharges to be covered included those into the "navigable waters of the United States," which was the broadest possible reach of federal jurisdiction under the Commerce Clause.¹⁰⁵ The traditional notion of navigability as a limit on the exercise of federal regulatory power was thus eliminated. Additionally the § 404 regulatory and permit program was to apply not only to private discharges but to federal activities which involved the discharge of dredged and fill material.¹⁰⁶

Because both the Corps of Engineers and the EPA were hesitant to impose such a wide-ranging regulatory program, little was done to implement § 404 until 1975. The Corps initially adopted regulations which continued to cling to the concept of navigability as a limitation on their jurisdiction. In Natural Resources Defense Council v. Callaway,¹⁰⁷ the Corps was ordered to adopt a new set of regulations recognizing the congressional mandate to expand its jurisdiction.¹⁰⁸

The EPA shortly thereafter promulgated its § 404(b) guidelines which were a necessary predicate to the Corps' regulatory activities.¹⁰⁹ The

A guidelines require the Regional Administrator consult with the District Engineer after the filing of any § 404 permit application.¹¹⁰ The guidelines set up criteria to evaluate the "physical and chemical-biological" interactive effects of the potential discharge of dredged or fill material.¹¹¹ In applying the guidelines if the District Engineer would conclude that the discharge is not to be allowed, he must then evaluate the economic impact on navigation and any change which will occur by the failure to allow said discharge.¹¹² The guidelines also set up a list of criteria to apply in selecting disposal sites for dredged or fill material.¹¹³

The Corps then promulgated regulations which included permit requirements for all activities occurring within wetlands but excluded such incidental discharges that might occur from normal farming, forestry, or ranching activities.¹¹⁴ The regulations covered coastal wetlands, artificially created channels, rivers, lakes, streams, and freshwater wetlands, including marshes, shallows, or swamps.¹¹⁵ Activities such as site development fill, road fill, dams or dikes, dredge allotment fills, gravel sites, and logging road sites would have been covered.¹¹⁶

A district court, however, invalidated that part of the Corps' regulation which held that placement of riprap and construction of dams on navigable waters was the discharge of a pollutant requiring a § 404 permit.¹¹⁷ The court found that construction and placement of riprap was beyond the scope of the definition of pollutant contained in the CWA and thus beyond the regulatory authority given the Corps under § 404. The district court decision was reversed on appeal. The appellate court relied on the broad goals of the CWA to support its reversal.¹¹⁸ Thus, had § 404 not been amended in 1977, all discharges would have had to go through the strict § 404 permit process.

The Corps' regulations also directly impact federal agency action involving the discharge of dredged or fill material. These discharges, whether done by the federal agency or by the Corps at the request of the federal agency, must undergo § 404 review and permit process.¹¹⁹ The Corps has set out its own general criteria for discharges of dredged or fill material, especially as they impact the fragile ecosystems of wetlands.¹²⁰ Furthermore federal licensees or permittees under § 401 must receive a state certification before they are entitled to a § 404 permit.¹²¹ Section 401(c) anticipated the problem of dredged or fill material discharges by authorizing the Corps to allow disposal in areas under its jurisdiction after the payment of a fee.¹²²

Under EPA regulations which govern state certification, all federal licensees or permittees must seek state certification for their non-NPDES permits.¹²³ The state must certify that the activity

will not violate water quality standards.¹²⁴ It may also impose conditions on the permit.¹²⁵ If the permit application is filed without a state certification it must be forwarded to the state for review.¹²⁶ There is no specific time limit other than a six-month guideline and a maximum of one year for the state to review the permit.¹²⁷

The 1977 CWA was a focal point for opposition to the broadened jurisdictional claims of the Corps under § 404. After much debate, however, the 1977 Act left intact the definition of navigable waters and thus retained the concept of broad regulation over discharge of dredged and fill material.¹²⁸ Congress believed restricting the § 404 program's coverage would cripple the effort to achieve fishable and swimmable waters.¹²⁹

The 1977 Act attempted to coordinate the § 404 regulatory permit program with the § 208 non-point source program.¹³⁰ In so doing, many of the more onerous burdens placed on the Forest Service or Forest Service permittees have been removed. The Act did so by first exempting from case-by-case § 404 permit review the routine earthmoving activities of agriculture, silviculture, and related industries that do not result in significant hydrologic modification.¹³¹ These activities, however, do not remain unregulated as they fall within the § 208 "best management practices" requirement for non-point source discharges.¹³²

A second exemption from the § 404 permit requirements is made for other named activities including the maintenance and emergency reconstruction of dikes, dams, levees, drains, riprap and bridge approaches, construction or maintenance of farm or stock ponds, irrigation or drainage ditches, construction of temporary sedimentation ponds, and the construction and maintenance of forest or temporary mining roads if accomplished through the use of "best management practices."¹³³ Before a source may be exempted from the § 404 permit requirements for forest and mining road construction, the road must be constructed and maintained in accordance with best management practices to assure that flow and circulation patterns and chemical and biological characteristics of the waters are not impaired and that the adverse effect on the aquatic environment is minimized.¹³⁴

A final exemption is made for any activity that is subject to a state-approved § 208 program for best management practices.¹³⁵ Apparently it was the intent of Congress not to utilize the exemptions for entire ranges of activities such as all silvicultural activities but instead for individual types of practices which can be regulated effectively without the need for an individual permit review process.¹³⁶

Regardless of the § 404 exemptions or exclusions, each of these activities still must comply with the effluent standards and prohibitions against toxic pollutant discharge mandated by § 307 of the Act.¹³⁷ This requirement provides a

safeguard on the exemptions because a discharge may have to be reviewed on a case-by-case basis to ascertain whether the discharge contains a toxic pollutant before the exemption would apply. Any discharge of dredged or fill material containing a toxic pollutant must meet the effluent standard promulgated for that pollutant.¹³⁸

The 1977 Act also authorizes the Corps to issue "general permits" replacing the need for an individual § 404 permit.¹³⁹ These general permits can be issued on a statewide, regional, or national basis after the Secretary of the Army determines that a category of activities involving discharges of dredged or fill material will cause only minimal adverse environmental effects.¹⁴⁰ These general permits shall be based on EPA's § 404(e) guidelines and must set forth applicable standards and requirements.¹⁴¹ A general permit can last for five years but may be revoked by the Secretary of the Army at any time, after notice and public hearing, if the authorized activities produce an adverse impact on the environment.¹⁴²

Under the 1972 Act the § 404 permit program was the sole regulatory program not transferable to the states after the meeting of minimum standards. As a result of state pressure to allow transfers, Congress responded by giving the state the option to assume responsibility for the administration of the Corps' part of the § 404 program, including the authority to issue general permits.¹⁴³ The states, however, were precluded from regulating dredge and fill material discharges into the navigable water of the United States as traditionally defined.¹⁴⁴

The EPA must approve any state application for administration of the § 404 program.¹⁴⁵ The state must meet eight requirements before it can be certified by the EPA.¹⁴⁶ The state program, in order to qualify, must assure compliance with the § 404(b) guidelines issued by the EPA. The EPA will retain substantial oversight of state approved § 404 programs. This includes review of all state § 404 individual and general permit applications. While the EPA cannot veto any state permit, it does have the right to comment and object, thus forcing a public hearing on permit applications.¹⁴⁷ The EPA may exempt classes of state § 404 permits from its own review.¹⁴⁸ Also once delegated, the § 404 permit program will no longer be a federal program and thus will avoid the present requirements of NEPA that attach to the Corps' § 404 activities.

As originally enacted § 404 applied to the discharge of dredged or fill material from all federal water resource development projects. Under the 1977 Act water projects developed by federal agencies other than the Corps of Engineers need not receive a § 404 permit if certain conditions are met.¹⁴⁹ The first condition is that the water projects must be specifically authorized by Congress. They also must be fully financed by the federal government.¹⁵⁰ For new water projects the sponsoring federal agency must file an environmental impact statement which explores the problem

of meeting § 404(d) guidelines.¹⁵¹ If the EIS is not filed, then a § 404 permit must be sought by the federal agency. Finally, the Corps and the Secretary of Agriculture must enter into an agreement to minimize duplication of paperwork under the § 404 permit program.

Although the 1977 Act retains the broad coverage of the § 404 regulatory program, Congress backed down from an administrative nightmare of requiring permits for thousands of minor activities which might insignificantly affect wetlands or other watersheds. By adding flexibility to the program, many of the typical agricultural and silvicultural activities which have only minimal adverse environmental impacts due to the discharge of dredged or fill material will be exempted from a case-by-case review. Instead the more general § 208 program of "best management practices" will attempt to deal with the problem of minor discharges which will not upset the ecological balance of wetlands and other bodies of water. Finally, the 1977 Clean Water Act removes from the application of § 404 federal water projects, other than those under the aegis of the Corps of Engineers, provided that they undertake a full environmental impact statement of the project regarding the need for the discharge of dredged or fill material prior to their congressional authorization.

Wetlands and Floodplains Management--In addition to the regulation of wetlands implicit in the § 404 dredge and fill program there is also an Executive Order which specifically governs federal agency action on wetlands.¹⁵² Executive Order 11,990 directs all federal agencies to provide leadership and to take action to minimize the destruction, loss, or degradation of wetlands through policies and practices dealing with the agency's acquiring, managing, and disposing of federal lands, the agency's construction of improvements, and through the conducting of activities and programs that affect land use, including regulatory and licensing authority.¹⁵³ The Order does not apply to agency licensing of private activities on non-federal land.¹⁵⁴

Each agency shall avoid providing any assistance for or undertaking any new improvements in wetlands unless the agency determines that there is no practicable alternative and that all actions to minimize harm to the wetlands have been taken.¹⁵⁵ In determining "practicability" the agency is to consider economic, environmental, and other relevant factors. Each agency must also provide public review of proposed wetlands activities and develop procedures to implement the Order.¹⁵⁶

The EPA has promulgated a statement of procedures¹⁵⁷ to implement both the wetlands Executive Order and a companion floodplains Executive Order.¹⁵⁸ It creates a policy of avoiding destruction of wetlands and occupying and modification of floodplains. It requires agencies to incorporate "floodplain management goals and wetland protection considerations" into these planning, management, and decisionmaking processes.¹⁵⁹ The EPA statement defines wetlands as:

those areas that are inundated by surface or ground water with a frequency sufficient to support and under normal conditions does or would support a prevalence of vegetative or aquatic life that requires saturated or seasonally saturated soil conditions for growth and reproduction.¹⁶⁰

Before undertaking any activity, each agency must determine whether the activity will be situated in a floodplain or wetland.¹⁶¹ If the activity is so located the public should be informed early in the process. If an environmental assessment (EA) or EIS is being prepared, a floodplains or wetlands assessment must be included.¹⁶² If no EA or EIS is being prepared, then a specialized floodplains or wetlands assessment must be prepared.¹⁶³ If the agency finds that there is no practical-siting alternative, it shall, after public notice, prepare a Statement of Findings not to exceed three pages. The Statement must include: (1) the reasons why the proposed action must be located in a floodplain or wetlands; (2) a description of the significant facts summarizing the siting decision; (3) a statement of conformance with state or local statutes or regulations; (4) a description of ameliorating action to minimize damage, and (5) a statement of the impact of the activity on the floodplain or wetlands.¹⁶⁴ If an EIS is filed, it must be included; if not, it is to be published in the Federal Register and other local publications. Any requests for authorizations or appropriations from the Office of Management and Budget (OMB) must include a Statement of Findings if the proposed action is in a floodplain or wetlands.¹⁶⁵

The wetlands Order applies to all projects which were not under construction in 1977 or which were not fully appropriated through the 1977 fiscal year.¹⁶⁶ Thus all future activities of the Forest Service or Forest Service permittees on federal lands come under the aegis of the floodplains and wetlands Executive Orders and implementing EPA statement.

Control of Non-Point Sources of Pollution--The 1972 FWPCA for the first time identified as a major source of pollution the so-called non-point sources, including agricultural, silvicultural, mining, and urban run-off.¹⁶⁷ Responding to the perceived need for some type of control over non-point sources, Congress voted to utilize a continuing planning process to first identify and then eliminate or at least regulate non-point sources.¹⁶⁸ Non-point sources (NPS) are those which do not emanate from any "discernible, confined and discrete conveyance."¹⁶⁹ The most important NPS pollutants are sediment, nutrients, mineral and silvicultural waste and other biodegradable matter.

The NPS control strategy was lumped into an overall water quality planning process required of the states under § 208 of the 1972 Act. The

states under § 208 had to develop areawide waste management plans to cover a myriad of water quality problems, including the need for waste treatment plants, the status of NPS pollution from agricultural, silvicultural, urban run-off, construction and mining activities, and other waste-generating activities.¹⁷⁰ Furthermore, § 303 called for the creation of a statewide regulatory and planning process including the promulgation of water quality standards, identification of areas with insufficient controls, and programs to control NPS.¹⁷¹

The § 208 regulatory program was to be initiated by the states, which would designate areas with substantial water quality problems.¹⁷² This program would be preceded by promulgation of EPA guidelines to help states identify critical water pollution problems.¹⁷³ Those guidelines were not published until November 1975, almost three years after the statutory deadline.¹⁷⁴ Within these problem areas the governor was to designate a planning agency responsible for developing the areawide waste treatment plant.¹⁷⁵ For all non-designated areas the state was to act as the planning agency. All planning agencies were then given the job to control, to the extent feasible, any NPS of pollution relating to agriculture, silviculture, mining, construction, and other activities.¹⁷⁶

In the proposed EPA regulations governing the § 208 non-point source program, the EPA was going to minimize the role of state water quality management planning in the non-designated areas and focus their attention on the areawide agencies where water quality problems were most difficult. In NRDC v. Costle¹⁷⁷ plaintiffs brought an action seeking to have the proposed regulations declared invalid thus forcing the states to put into effect a full § 208 planning effort in the non-designated areas. Both the district court and the court of appeals agreed with the plaintiffs that the goals of the FWPCA would be severely hindered if some 95% of the navigable waters of the United States were to be omitted from the § 208 planning process.¹⁷⁸ Thus, state agencies would have to act as if they were a designated areawide planning agency and develop a full planning and regulatory program as required by § 208.

The § 208 program has two separate levels insofar as NPS are concerned. The first was the mandate that the state or areawide agencies develop the areawide water authority management plan by July 1976.¹⁷⁹ For several reasons this was an impossible task. The 1977 CWA later amended the deadline for the submission of the § 208 plans to three years after the time of the initial grants from the EPA to the state or areawide agency.¹⁸⁰ The second phase of the program involves the implementation of the plan through a regulatory program or programs designed to achieve the goals of the § 208 plan.¹⁸¹

In preparing § 208 plans the state and areawide agencies are governed by two series of EPA regulations regarding both the planning and the

management processes. The regulations cover both the § 208 and § 303 processes.¹⁸² The continuous planning process is broken down into seven segments: (1) develop a state/local water quality decisionmaking process; (2) establish an intergovernmental process for water quality decisions between state and areawide agencies; (3) develop public participation; (4) prepare water quality management plans and standards; (5) develop a state strategy to achieve the plan; (6) implement the plan; and (7) periodically review the plan and standards.¹⁸³

The state planning agency is authorized to delegate responsibility for the water quality management plan to federal agencies.¹⁸⁴ After the submission of the plan the Governor must designate a management agency or agencies to implement the plan. This implementation also may involve a federal agency.¹⁸⁵ If the state or areawide agency determines that cooperation from a federal agency or agencies is required, the state or areawide agency shall designate that agency and seek cooperation with it in accordance with EPA guidelines.¹⁸⁶ Those guidelines require federal properties, facilities and activities to be in compliance with any state or local standards.¹⁸⁷ Under the revised requirements of § 313 this compliance would entail both substantive and procedural requirements. Furthermore federal agencies are required to cooperate and support state or areawide agencies in formulating and implementing those segments of their water quality management plans which relate to federal properties.¹⁸⁸ Disputes or conflicts between federal and § 208 agencies affecting the application or compliance with a control or abatement strategy shall be mediated by the EPA with later appeal to the Office of Management and Budget.¹⁸⁹ Section 208 agencies must also provide a mechanism for significant impact from affected federal agencies.¹⁹⁰

The § 208 plans must include an assessment of water quality problems caused by non-point sources.¹⁹¹ The plan must identify and evaluate all measures needed to achieve the desired level of control through the application of best management practices (BMPs).¹⁹² For a category of non-point source control that is identified, the plan must contain the proposed regulatory programs to achieve the controls, the period of time required to achieve the desired control, the management agency needed to achieve the controls, and the costs to attain the controls.¹⁹³ The non-point source categories include silviculturally related non-point sources, mine-related sources including new, current, and abandoned surface and underground mine run-off, or construction activity-related sources. The categories also include sources of pollution related to hydrologic modification caused by changes in the movement flow or circulation of any navigable water or groundwater.¹⁹⁴

The § 208 plan must contain a regulatory program for non-point sources that includes the requirement that non-point sources use BMPs in

order to minimize water pollution.¹⁹⁵ A BMP is defined as "a practice, or combination of practices, that if determined by a state (or designated area-wide planning agency) after problem assessment, examination of alternative practices, and appropriate public participation, the most effective practicable (including technological, economic and institutional considerations) means of preventing or reducing the amount of pollution generated by non-point sources to a level compatible with water quality goals."¹⁹⁶ BMPs are site specific and may change even within a particular region given the nature of the amount of pollution caused by the activity, the ability of the receiving stream to absorb the pollution, the water quality of the receiving stream, and other factors.

Once these BMPs have been developed, they will become part of the implementation of the § 208 plan. All activities of a non-point nature will then become subject to the application of the BMPs to their activities. The activities of both federal agencies and federal licensees would, of course, be included.

One additional factor enters into the § 208 plan. The EPA has required that all § 208 plans incorporate an anti-degradation policy.¹⁹⁷ Thus, non-point sources, which in the case of silvicultural activities are primarily in rural wildlands, would probably not cause the violation of most water quality standards. However, because of the anti-degradation policy the agency would still have to utilize BMPs as determined by the relevant § 208 agency in order to minimize the degradation of any receiving water body.

The EPA has published a non-point source control guideline for silvicultural activity. The guideline is designed to assist § 208 agencies develop BMPs.¹⁹⁸ The Forest Service has cooperated and should continue to cooperate with § 208 agencies to assist them in determining BMPs and then implementing the § 208 plan so that water quality goals are achieved.

NOTES

¹³³ U.S.C. §§ 1251 *et seq.* (1976). The statutory provisions will be referred to as the Clean Water Act (CWA). References to the sections of the Federal Water Pollution Control Act Amendments of 1972 will simply be the 1972 Act. Statutory citations will refer first to the section of the 1972 or 1977 Act, and then to the U.S.C. citation.

²³³ U.S.C. §§ 1251 *et seq.* (1976 and Supp. I 1977). Text references to sections of the Clean Water Act of 1977 will simply be the 1977 Act.

³ Section 301(b)(1)(A), 33 U.S.C. § 1311(b)(1)(A) (1976 and Supp. I 1977).

⁴ Section 301(b)(2)(A), *id.* at § 1311(b)(2)(A).

⁵ Sections 302-03, *id.* at §§ 1312-13.

⁶ Section 402, *id.* at § 1342.

⁷Section 208, *id.* at § 1288.
⁸Sections 201-07, *id.* at § 1281-87.
⁹Section 301(a), *id.* at § 1311(a).
¹⁰Section 502(6), *id.* at § 1362(6). *See also* 40 C.F.R. § 125.1(y) (1978).
¹¹Section 502(14), *id.* at § 1362(14). *See also* 40 C.F.R. § 125.1(x) (1978).
¹²*United States v. Holland*, 373 F. Supp. 665 (M.D. Fla. 1974), 40 C.F.R. § 125.1(p) (1978).
¹³Section 301(b), 33 U.S.C. § 1311(b) (1976 and Supp. I 1977).
¹⁴Sections 302-03, *id.* at §§ 1312-13. The CWA requires each state to identify waters which will not attain water quality standards by application of § 301 effluent standards on all point source discharges to that body of water. Section 303(d)(1)(A), *id.* at § 1313(d)(1)(A).
¹⁵Section 306, *id.* at § 1316.
¹⁶Section 301(b)(1)(A), *id.* at § 1311(b)(1)(A); § 402(a)(1), *id.* at § 1342(a)(1).
¹⁷Section 301(b)(2)(A), *id.* at § 1311(b)(2)(A).
¹⁸Section 301(b)(1)(A), *id.* at § 1311(b)(1)(A). *See generally* 40 C.F.R. 402-699 (1978).
¹⁹Pub. L. No. 95-217, § 45, 91 Stat. 1584-86 (1977).
²⁰Section 301(i)(2)(A), 33 U.S.C. § 1311(i)(2)(A) (1976 and Supp. I 1977).
²¹Pub. L. No. 95-217, § 56, 91 Stat. 1592-93 (1977).
²²Section 309(a)(5)(A), 33 U.S.C. § 1319(a)(5)(B) (1976 and Supp. I 1977).
²³33 U.S.C. § 1319(c)(6) (Supp. I 1977).
²⁴Sections 302-03, *id.* at § 1312-13; § 301(b)(3), *id.* at § 1311(b)(3).
²⁵Section 303, *id.* at § 1313.
²⁶40 C.F.R. 120 (1978).
²⁷Section 301(b)(2)(E), 33 U.S.C. § 1311(b)(2)(E) (1976 and Supp. I 1977).
²⁸Section 304(b)(4), *id.* at § 1314(b)(4).
²⁹*See generally* S. Rep. No. 95-370, 95th Cong., 1st Sess. 54-57 (1977); H.R. Rep. No. 95-830, 95th Cong., 1st Sess. 81-85 (1978).
³⁰Sections 304(a)-(b)(4), 33 U.S.C. §§ 1314(a)-(b)(4) (1976 and Supp. I 1977).
³¹*See note 29 supra. See also Quarles, Impact of the 1977 Clean Water Act Amendments on Industrial Discharges* [1978] ENV'T'L REP. [Mono # 25].
³²40 E.R.C. 2120 (D.C. 1976).
³³Sections 301(b)(2)(C) & (D), 33 U.S.C. §§ 1311(b)(3)(C) & (D) (1976 and Supp. I 1977); § 307, *id.* at § 1317.
³⁴*See generally* 40 C.F.R. 129 (1978) for the list of toxic effluent standards promulgated. 40 C.F.R. 104 (1978) sets down the guidelines for the public hearings in these toxic effluent standards.
³⁵Section 301(b)(2)(F), 33 U.S.C. § 1311(b)(2)(F) (1976 and Supp. I 1977).

³⁶Section 402, *id.* at § 1341. The Administrator has recently revised the NPDES regulations to conform to the requirements of the 1977 Act and to streamline the procedure. 44 Fed. Reg. 32,854-956 *amending* 40 C.F.R. 6, 121-25, 402-03 (1979). These rules have been amended to fit into a consolidated permit program for the NPDES, Safe Drinking Water Act, PSD, Resource Conservation and Resources Act and § 404 Dredge and Fill Permit Programs. *See* Final Rules, 45 Fed. Reg. 33,290 (May 19, 1980) (application and certification requirements); 45 *id.* 33,516 (May 19, 1980) (application forms); 45 *id.* 52,149 (Aug. 6, 1980) (policy statement).
³⁷42 E.R.C. 1657 (7th Cir. 1979).
³⁸*Id.* at 1658-59.
³⁹*Id.* The two sections are §§ 304(i) and 402(b), 33 U.S.C. §§ 1314(i), 1342(b) (1976).
⁴⁰Pub. L. No. 92-500, § 313, 86 Stat. 875 (1972).
⁴¹*EPA v. State Water Resources Control Board*, 426 U.S. 200, 209-10 (1975).
⁴²*Id.*
⁴³426 U.S. 167 (1975).
⁴⁴*Id.* at 200.
⁴⁵*Id.* at 227-28.
⁴⁶*Id.* at 214-15. *See also* Exec. Order 11,752; 40 C.F.R. § 130.35 (1978).
⁴⁷Pub. L. No. 95-217, § 60, 91 Stat. 1597 (1977). *See also* H.R. Rep. 95-830, 95th Cong., 1st Sess. 93 (1977).
⁴⁸Section 313, 33 U.S.C. § 1323 (1976 and Supp. I 1977).
⁴⁹*Id.*
⁵⁰40 C.F.R. §§ 125.4(f) & (j), 38 Fed. Reg. 18001-02 (1973).
⁵¹396 F. Supp. 1393 (D.D.C. 1975).
⁵²*Id.* at 1402.
⁵³*Id.* at 1395-96.
⁵⁴40 C.F.R. §§ 124.11(h)(5) (1974).
⁵⁵396 F. Supp. at 1395.
⁵⁶*Id.* at 1396-1400.
⁵⁷*Id.* at 1401.
⁵⁸40 C.F.R. § 122.46 (1979) (formerly at 40 C.F.R. § 124.85).
⁵⁹*See* 44 Fed. Reg. 32871 where the EPA opted to continue this ad hoc rule while it was amending its NPDES program.
⁶⁰40 C.F.R. § 122.46(b) (1979) (formerly at 40 C.F.R. § 124.85(b)).
⁶¹*Id.*
⁶²*Id.*
⁶³40 C.F.R. §§ 436.20-22 (1978).
⁶⁴*Id.* at § 436.22.
⁶⁵*Id.*

⁶⁶Id.
⁶⁷Id.
⁶⁸Id.
⁶⁹Id.
⁷⁰Id.
⁷¹⁴⁰ C.F.R. § 122.46(b) (1979) (formerly at 40 C.F.R. § 124.85(b)).
⁷²Id.
⁷³⁴⁰ C.F.R. §§ 429.100-06 (1978).
⁷⁴Id. at § 429.103.
⁷⁵Id. at § 429.104.
⁷⁶Id.
⁷⁷Id.
⁷⁸Id.
⁷⁹Id. at § 429.105.
⁸⁰Id. at § 429.106.
⁸¹³⁹⁶ F. Supp. 1393 (D.D.C. 1975).
⁸²⁴⁰ C.F.R. § 122.48 (1979).
⁸³⁴² Fed. Reg. 5846 (1977).
⁸⁴⁴⁰ C.F.R. § 122.48(b)(2) (1979). See 44 Fed. Reg. 32873 (1979).
⁸⁵Id. at § 122.48(c).
⁸⁶Id.
⁸⁷Id. at § 122.48(b).
⁸⁸Id. at § 122.48(a). See also id. at §§ 123.22, 124.32(a).
⁸⁹Id. at § 122.48(d).
⁹⁰Id. at § 122.48(e).
⁹¹Id.
⁹²Section 401, 33 U.S.C. § 1341 (1976 and Supp. I 1977).
⁹³Section 401(a)(1), id. at § 1341(a)(1).
⁹⁴⁴⁰ C.F.R. §§ 124.21 to .24 (1979).
⁹⁵Id. at § 124.21(c)(3).
⁹⁶Id. at § 124.22(b)(1).
⁹⁷Id. at §§ 124.22(b)(2) & (3).
⁹⁸Id. at § 124.23(a).
⁹⁹Id. at § 124.23(c).
¹⁰⁰Id. at § 124.24.
¹⁰¹³⁰ Stat. 1151 (1899); 33 U.S.C. § 403 (1976).
¹⁰²Section 404, 33 U.S.C. § 1344 (1976 and Supp. I 1977).
¹⁰³Pub. L. No. 92-500, § 404(a), 86 Stat. 884 (1972).
¹⁰⁴Pub. L. No. 92-500, § 404(b), 86 Stat. 884 (1972).
¹⁰⁵See W. ROGERS, ENVIRONMENTAL LAW 401-03 (1977). See, e.g., United States v. Ashland Oil & Trans. Co., 364 F. Supp. 349 (W.D. Ky. 1973),

aff'd 504 F.2d 1317 (6th Cir. 1974); United States v. Holland, 373 F. Supp. 665 (M.D. Fla. 1974); Leslie Salt Co. v. Froehlke, 578 F.2d 742 (9th Cir. 1978).
¹⁰⁶See, e.g., Cooper v. Wisdom, 440 F. Supp. 1027 (M.D. Fla. 1977).
¹⁰⁷³⁹² F. Supp. 685 (D.D.C. 1975).
¹⁰⁸Id. at 686.
¹⁰⁹⁴⁰ C.F.R. §§ 230.1 to .7 (1978).
¹¹⁰Id. at § 230.3.
¹¹¹Id. at § 230.4.
¹¹²Id. at § 230.1(a)(1).
¹¹³Id. at § 230.5.
¹¹⁴Id. at §§ 323.2(l), 323.3(a) (1979).
¹¹⁵Id. at § 323.2(a).
¹¹⁶Id. at § 323.2(n).
¹¹⁷Minnehaha Creek Watershed District v. Hoffman, 449 F. Supp. 876 (D. Minn. 1978).
¹¹⁸⁵⁹⁷ F.2d 617 (8th Cir. 1979).
¹¹⁹⁴⁰ C.F.R. § 323.3(d) (1979).
¹²⁰Id. at § 320.4(b).
¹²¹Section 401, 33 U.S.C. § 1341 (1976 and Supp. I 1977).
¹²²Section 401(c), id. at § 1341(c).
¹²³⁴⁰ C.F.R. 123, renumbered, 40 C.F.R. 121, 44 Fed. Reg. 32,899 (1979).
¹²⁴⁴⁰ C.F.R. § 121.2(a)(3) (1979).
¹²⁵Id. at § 121.2(a)(4).
¹²⁶Id. at § 121.14.
¹²⁷⁴⁰ C.F.R. § 121.16(o) (1978).
¹²⁸See, e.g., S. Rep. No. 95-370, 95th Cong., 1st Sess. 75 (1977).
¹²⁹Id.
¹³⁰H.R. Rep. No. 95-830, 95th Cong., 1st Sess. 100-01 (1977).
¹³¹Section 404(f)(1)(A), 33 U.S.C. § 1344(e)(1)(A) (1976 and Supp. I 1977).
¹³²Section 208, id. at § 1288.
¹³³Sections 404(f)(1)(B)-(E), id. at §§ 1344(f)(1)(B)-(E).
¹³⁴Section 404(f)(1)(E), id. at § 1344(f)(1)(E).
¹³⁵Section 404(f)(1)(F), id. at § 1344(f)(1)(F).
¹³⁶H.R. Rep. No. 95-830, 95th Cong., 1st Sess. 100-01 (1977).
¹³⁷Section 404(f)(1), 33 U.S.C. § 1344(f)(1) (1976 and Supp. I 1977).
¹³⁸Section 307, id. at § 1317.
¹³⁹Section 404(e), id. at § 1344(e).
¹⁴⁰Section 404(e)(1), id. at § 1344(e)(1).
¹⁴¹Id.
¹⁴²Section 404(p)(2), id. at § 1344(e)(2).

¹⁴³Section 404(g)(1), *id.* at § 1344(g).
¹⁴⁴Section 404(g)(1), *id.* at § 1344(g)(1).
¹⁴⁵Section 404(h), *id.* at § 1344(h).
¹⁴⁶Sections 404(h)(1)(A)-(H), *id.* at §§ 1344(h)(1)(A)-(H).
¹⁴⁷Section 404(j), *id.* at § 1344(j).
¹⁴⁸Section 404(ℓ), *id.* at § 1344(ℓ).
¹⁴⁹Section 404(r), *id.* at § 1344(r).
¹⁵⁰*Id.*
¹⁵¹*Id.*
¹⁵²Exec. Order No. 11,990 (May 24, 1977).
¹⁵³*Id.* at § 1(a).
¹⁵⁴*Id.* at § 1(b).
¹⁵⁵*Id.* at § 2(a).
¹⁵⁶*Id.* at § 2(b).
¹⁵⁷44 Fed. Reg. 1455 (1979).
¹⁵⁸Exec. Order No. 11,988 (May 24, 1977).
¹⁵⁹44 Fed. Reg. 1455 (1979).
¹⁶⁰*Id.* at 1456.
¹⁶¹*Id.*
¹⁶²*Id.*
¹⁶³*Id.*
¹⁶⁴*Id.*
¹⁶⁵*Id.* at 1456-57.
¹⁶⁶Exec. Order No. 11,980, § 8 (May 24, 1977).
¹⁶⁷Pub. L. No. 95-200, § 208, 88 Stat. 839-43 (1972).
¹⁶⁸*Id.*
¹⁶⁹Section 502(14), 33 U.S.C. § 1362(14) (1976 and Supp. I 1977).
¹⁷⁰Sections 208(b)(2)(A)-(K), *id.* at §§ 1288(b)(2)(A)-(K).
¹⁷¹Section 303, *id.* at § 1313.
¹⁷²Section 208(a)(2), *id.* at § 1288(a)(2).
¹⁷³Section 208(a)(1), *id.* at § 1288(a)(1).
¹⁷⁴40 Fed. Reg. 55,334 (1975); 40 C.F.R. 130 (1978).
¹⁷⁵Section 208(a)(2), 33 U.S.C. § 1288(a)(2) (1976 and Supp. I 1977).
¹⁷⁶Section 208(b)(2)(F), *id.* at § 1288(b)(2)(F).
¹⁷⁷396 F. Supp. 1386 (D.D.C. 1975), *aff'd sub nom.*, NRDC v. Train, 564 F.2d 573 (D.C. Cir. 1977).
¹⁷⁸*Id.* at 574-75.
¹⁷⁹Sections 208(a) & (b), 33 U.S.C. §§ 1288(a) & 1288(b) (1976 and Supp. I 1977).
¹⁸⁰Section 208(b)(1), *id.* at § 1288(b)(1).
¹⁸¹Sections 208(c)(2)(A)-(I), *id.* at §§ 1288(c)(2)(A)-(I).
¹⁸²40 C.F.R. §§ 130.1(a) & 131.1(a) (1978).
¹⁸³*Id.* at §§ 130.1(d)(1)-(7).

¹⁸⁴*Id.* at § 130.14(a).
¹⁸⁵*Id.* at § 130.15(a).
¹⁸⁶*Id.* at § 130.15(b).
¹⁸⁷*Id.* at § 130.35(c).
¹⁸⁸*Id.* at § 130.35(b).
¹⁸⁹*Id.* at §§ 130.35(c) & (d).
¹⁹⁰*Id.* at § 130.17(c).
¹⁹¹*Id.* at §§ 130.20(a); 131.11(j).
¹⁹²*Id.* at § 131.11(j)(1).
¹⁹³*Id.* at § 131.11(j)(2).
¹⁹⁴*Id.* at § 131.11(j)(3).
¹⁹⁵*Id.* at §§ 131.11(n) & (o).
¹⁹⁶*Id.* at § 130.2(g).
¹⁹⁷*Id.* at § 131.11(e).
¹⁹⁸U.S. EPA, Non-Point Source Control Guidance - Silvicultural Activities (1977).

3. Minerals*

Mineral resources on Forest Service land present special planning and management problems. Pressure to develop mineral resources on public lands has increased in light of the shortage of fossil fuels from other sources. Determination of the location and extent of mineral resources is the first problem for the land manager. The planner must determine early in the planning process what minerals are presently being developed, what mines are open, and where known resources are located. Steps also must be taken to determine what unknown resources, if any, exist in the area being planned.

Another planning problem created is the effect of mineral development on other uses of a forest or land. The prospecting, exploratory, and development work as well as the transportation of the extracted resource are particularly troublesome to the land manager. Each of these activities may involve actions which are incompatible with other uses or threaten harm to the environment which the planner must preserve. To the extent that the mining activity would interfere with other uses, it must be fully considered and evaluated in the multiple-use planning process. The spectrum for multiple-use consideration may range from full development to total prohibition of mining a resource, depending on other factors evaluated in the multiple-use planning process. Moreover, under particular statutes such as the Wilderness Act or the Wild and Scenic Rivers Act limitations on mining activities exist because of their incompatibility with other statutory uses. In those areas a total prohibition on mining activities may be necessary to fulfill the objectives of those acts.

* The notes for subsection 3 begin on p. 57.

All subsequent actions of the federal land manager must be compatible with the integrated forest plan. Any mineral use application must propose mining in those areas that have been designated in the plan as appropriate for developing mineral resources. If the proposed mining is not compatible with the plan, the application must be denied. Although mining can only occur where the mineral is located, each of those locations is not necessarily suited for mining activities. A federal land manager must consider other relevant factors such as the practical problems associated with removing the resource, compatibility with wilderness or other uses, and suitability of an area for mining, for example, coal mining on steep slopes. Or a necessary right-of-way or road for either exploratory or development work could threaten the extinction of an endangered species and hence make mining impermissible as a matter of law. Some areas in a plan may be determined unsuitable for mineral development. And the plan may limit the method of mining, for example, allowing coal extraction by deep pit, but not by strip mining. Any application for exploration or development must then comport with the plan.

Mining activities also present serious environmental concerns. Inherent in the development of mineral resources is the potential to create serious air and water pollution problems, as well as potential destruction of the surface and subsurface of the area being mined. The access roads and other transportation systems needed to conduct the mining activity can also be particularly disruptive of other uses and the natural environment. These factors must be fully considered before granting the permission to undertake the exploratory work and before entering into a lease or permit for fuller development of the resource. They also must be evaluated in the NEPA EIS process.

Options available to the federal land manager include prohibiting the activity altogether or permitting it on whatever conditions and restrictions are necessary during all stages of developing the mineral resource to assure minimum disruption of other uses and maximum protection of the natural environment. In addition, conditions may be imposed on post-mining operations. These may require reclamation and restoration of the area after the operation is completed, and they may require mitigation measures to minimize the environmental harm while the work is ongoing.

Any use of the forest land to develop mineral resources must be done in conjunction with applicable federal and state laws concerning air and water quality. To the extent that the mining activities violate the visibility requirements of the federal Clean Air Act,¹ restrictions and controls on how the activity is conducted must be imposed by the state regulatory agency or the EPA. Moreover, coordination with state agencies is required concerning the impact on clean air areas. Applicable prevention of significant deterioration standards must be met. Any incremental increase

in air pollutants caused by the activity both in the work area and also in immediate adjacent areas must be within applicable PSD and non-attainment area plan limitations. State or federal environmental quality standards must be met in carrying out the mining activities.

The same principles would apply to water pollution problems under the federal Clean Water Act.² Any necessary certificates from a state agency must be obtained before the activity could be undertaken. Monitoring would be necessary to assure that the activity does not violate established water quality or performance standards under applicable state and federal laws. If the activity is proposed or being done in an environmentally sensitive area such as a coastal zone, particular considerations must be given to state requirements and standards respecting water quality in that area. Necessary permission under an applicable state coastal zone management plan must be obtained. If the activity cannot be undertaken consistent with the applicable federal and state air, water, and other environmental quality standards, the federal land manager would have to deny permission to allow the activity.

After the initial determination of compatibility with the plan has been made, the land manager must determine what regulation and controls are appropriate. Specifically, constraints must be imposed to assure maximum protection of the natural environment and to fulfill the purposes of the national forests. Conditions may be imposed in the mineral lease itself or as regulations and controls on the mining operations and activities generally.

As a general proposition the Forest Service cannot deny a person access to a mineral claim under the general mining laws.³ The claimant has the right to work the claim and meet the mineral and statutory requirements for protecting that claim. However, the right of egress and ingress to the claim under the law is subject to reasonable regulation by the Secretary of Agriculture.⁴ The Forest Service can and should establish the location of rights-of-way in such a manner that they have minimum impact on the natural environment and minimum disruption of other activities or uses of the forest.

(a) Mineral Lands Leasing Act⁵

This Act provides the basic authority for federal agencies to lease mineral rights on public lands.⁶ The minerals covered include oil and gas, oil shale, and coal. Under the Act the basic leasing authority over federal lands is granted to the Department of Interior.

The rights-of-way provisions of the Act are particularly important to the Forest Service. Authority to regulate rights-of-way and impose reasonable limitations on their use is granted to the Forest Service. Regulations must be issued

that require restoration, revegetation, or curtailment of the erosion of the surface of the land. The Forest Service must assure that the rights-of-way when they are granted will not violate applicable air or water quality standards with respect to related facilities necessary for the mining operation. The authority of the Forest Service also includes the ability to control or prevent damage to the environment, including fish and wildlife habitat, private or public property, or hazards to public health or safety. The regulations must protect individuals living in the area who need the fish and wildlife and other resources of the area for subsistence purposes.

The authority under this Act for controlling rights-of-way strongly emphasizes environmental protection. The Forest Service must include provisions in grants of rights-of-way allowing for their termination upon threatened environmental harm. Rights-of-way should be planned for use in common where practicable rather than having separate ones for each activity concerning the use of the forest. Other provisions that may be included in a right-of-way or permit may regulate the extent, duration, survey, location, construction, operation, maintenance, use, and termination of the rights-of-way or permits granted by the Forest Service. The width of a pipeline right-of-way is limited by law to 50 feet of the ground actually occupied for the pipe.

The right-of-way permit also must assure that the operation of the pipeline or related facilities will be done in a manner to protect the safety of workers and the public from sudden ruptures or slow degradation of the pipeline.

Right-of-way applicants may satisfy certain statutory qualifications. The applicant must show the technical and financial capability to construct, operate, maintain, and terminate the project for which the right-of-way is being granted before the application is granted or renewed. Public hearings on rights-of-way are required. Rights-of-way authorized under the Act may extend for any reasonable term which is determined in light of the cost of the facility, its useful life, and any public service it serves, so long as the term does not exceed 30 years. Rights-of-way granted may be suspended or abandoned according to the statutory procedures. The Forest Service may require the holder of a right-of-way or permit to post a bond to secure performance of the conditions and obligations in the permits or right-of-way.

(b) Materials Disposal Act⁷

This Act provides the basic authority for the Forest Service to regulate unpatented mining claims. Under the Act those claims are limited to use for prospecting, mining, or processing operations and uses reasonably incidental to the unpatented claim. The holder of an unpatented mining claim has the right to reasonable use of

the surface and surface resources, including timber, that are necessary to develop the claim. At all times the holder of the claim is subject to the power of the United States to manage or dispose of surface vegetative resources and to manage or dispose of surface vegetative resources and to manage other surface resources, except the mineral deposits. The unpatented claim also is subject to rights of ingress and egress or use by other holders of permits from the Forest Service.

Under the Materials Disposal Act certain materials on public lands may be disposed of by contract rather than competitive bid. Timber, for example, may be sold by a negotiated contract, if the sale is of less than 250,000 board feet or is for materials used in the public works improvement program which would be unduly delayed by advertising required in competitive bidding. Negotiated contracts are also allowed if the contract is for property that is impractical to obtain by competitive bids.

(c) Mineral Leasing Act for Acquired Lands⁸

Under this Act the Secretary of Interior has the authority to grant interests in the mineral deposits on the acquired land. That power, however, is subject to the approval of the administering agency. Hence, the Secretary of Agriculture must concur in the disposition of the mineral interests on the acquired land of the Forest Service. This Act in no way affects the existing statutory authority of the Secretary of Agriculture concerning the sale or disposition of acquired lands. If any action or sale is made by the Secretary of Agriculture, it would be subject to any existing lease under this Act. Leases made under this Act are pursuant to and subject to the terms of the Mineral Leasing Act.

(d) Federal Coal Leasing Amendments Act of 1975⁹

These amendments make several major changes in coal leasing on federal lands. They expressly limit the quantity of land that a lessee may lease and subject all lease holdings to the federal anti-trust laws. Several provisions relate to granting rights-of-way over federal lands and the authority of agencies to grant them. The Amendments alter the mineral leasing process by requiring that the coal leases be granted on a competitive basis, but for no less than the fair market value of the leases.

The Amendments authorize existing leases to be amended to provide stricter regulation under limited circumstances and allow existing leases to be governed by new lease provisions. New provisions authorize exploratory programs for developing non-recoverable acreages for coal development. The Act expressly states that it does not alter the Mineral Lands Leasing Act to allow any mining in certain selected areas including the National Wilderness Preservation System, the National System of Trails, and the Wild and Scenic Rivers, including study rivers.¹⁰

In granting coal leases the Secretary must first make a determination of the fair market value of the coal. This must be done in light of hearings and consideration of public comment on the fair market value. Lease sales may be made only if the lands containing the coal deposits have been included in a comprehensive land use plan and if the sale is compatible with the plan. These requirements would seem to include the integrated forest plan for units of the national forest system. Federal land managers must prepare land use plans for the national forest systems unless the non-federal interest in the surface or the coal resources are insufficient to justify the preparation costs of the federal comprehensive plan. In those cases the lease sales may be based on a state land use plan if it has been prepared by the state in which the coal deposits are located or on a Department of Interior land use analysis.

Leases of land under the jurisdiction of agencies other than the Department of Interior can be made only if the governing agency consents to the lease. That lease would be subject to the conditions imposed by the governing agency with respect to the use and protection of non-mineral interests of the land. The Act also imposes several procedural requirements, including public hearings and notice of the competitive bids, that must be met before a lease is granted.

Any coal lease issued under the Act must be preceded by a study which considers the effects on the community or area where the mining will be done, including the impact on the environment, agriculture and economic activities, and public services. The study must also evaluate and compare the effects of recovering coal by deep pit mining, surface mining, or other methods to determine which will achieve the maximum economic recovery within the proposed tract. No mining operating plan can be approved that does not achieve the maximum economic recovery of the coal within the tract. Every lease issued pursuant to the Act must comply with the Federal Clean Water Act and the Federal Clean Air Act requirements.

(e) Surface Mining Control and Reclamation Act of 1977¹¹

This Act contains the major authority and mandate of Congress to agencies to preserve coal lands and reclaim them after mining activities. The Act establishes a cooperative arrangement between the federal and state governments under which the federal government approves state plans which can be enforced by states. The state plans must implement national as well as state standards concerning any mining activities, development, or reclamation activities. Certain areas are excluded from development of coal, including prime agricultural land and environmentally sensitive areas. Surface mining operations cannot be conducted in those areas.

Under the Act every federal lease for coal development must be subject to all standards and requirements of the federal lands program, the Act, and any applicable approved state program concerning surface mining operations and reclamation, which may be incorporated by reference into the lease. The Act requires the Secretary of Interior to review federal lands and determine those unsuited for surface mining operations. Those federal lands designated unsuited cannot be used for coal mining activities.

After August 3, 1977, surface coal mining activities on federal land within a national forest can be undertaken only if the Secretary of Interior makes several findings. Included are findings that there are no significant recreational, timber, economic, or other values which may be incompatible with the surface mining operations. In addition, the operations must be incidental to an underground coal mine or on lands that the Secretary of Agriculture has determined do not have significant forest cover on forests west of the 100th meridian. Any mining so authorized must be in compliance with the Multiple-Use Sustained-Yield Act of 1960, the Federal Coal Leasing Amendments Act of 1975, NFMA, as well as the Federal Surface Mining Act.

There are other ways in which the Forest Service could be involved with activities under the Act. The head of a federal agency may file written objections and be heard in opposition to an application for a surface mining permit from either a federal or state regulatory authority. If the Forest Service objects to surface mining activities and an application is pending concerning them before a state or federal authority, the Forest Service should raise those objections in those hearings. An agency may also be involved in bonding requirements under the Act. The Act requires performance bonds and total or partial release of them upon written request of the permittee and completion of required work. Federal agencies may object to the release of bonds after receiving notice of the permittee's request. If dissatisfied with work of the permittee, the Forest Service should raise those objections in the appropriate bond release hearing.

Determining the appropriate types of regulations to impose either by lease or general regulation is not an easy task. The trend of the more recent mining legislation clearly indicates that greater protection of the natural environment is mandatory. Not only is that fact clear in the language of the mineral statutes, but also it is reinforced by other laws, for example, activities requiring an EIS under NEPA.¹²

Clearly NEPA mandates that mitigation efforts and environmentally sound alternatives be considered in undertaking major federal action that significantly affects the quality of the human environment. Because of the specific problems that a mining activity presents with respect to air quality, land

use, water quality, and wildlife, it seems clear that a site specific EIS must be prepared concerning any proposed lease. In one case the renewal of a special use permit for exploratory activities was stopped pending completion of an EIS.¹³

Regulation of pre-existing claims is more difficult, however. Because many of those claims were established before the environmental statutes or more recent legislation imposing performance or quality standards, arguably, they are not subject to those standards retroactively. However, the Organic Act gives the Secretary of Agriculture general administrative authority over the use of NFS lands. That authority includes the power to make reasonable regulations concerning the location of roads and uses of those lands. This authority can include selecting rights-of-way that create or threaten the least environmental harm and regulating uses, work, and their by-products to assure the activities are conducted in a manner that is compatible with other uses and restores the area to its original condition.

The dilemma with pre-existing rights is extraordinarily complex. Rights acquired under the 1920 Mineral Leasing Act impose a mandatory duty on the Secretary of Interior to issue a coal lease to a holder of a valid prospecting permit.¹⁴ The Secretary of Interior cannot refuse to issue the lease for environmental reasons.¹⁵ However, even though issuance of the "preference right" lease is a mandatory duty of the Secretary of Interior, the issuance can be done on terms and conditions protecting the environment. Moreover, the same court held that the issuance of a "preference right" coal lease is major federal action significantly affecting the quality of the human environment. Hence, an EIS is required by NEPA on the proposed issuance of those leases.¹⁶

Development of geothermal energy resources also has raised NEPA problems. A court recently upheld a determination that granting a special use permit to undertake exploratory activities to determine the economic feasibility of extracting the geothermal resource did not require a NEPA EIS.¹⁷ The court found reasonable the agency's determination that the surface work and other exploratory activities would have minimal impact in a known geothermal reserve area. The court noted that an adequate record had been prepared by the agency to support its decision which was made after adequately considering relevant factors. The court left open the question of whether an EIS would be necessary before granting a lease.

In summary, the mineral resources on NFS lands are of special concern because of the increased demand for their development. The Forest Service first must determine the extent and scope of mineral deposits on NFS lands. This determination should be done in the planning process after appropriate study and inventory of NFS lands. During the planning process suitability decisions can be made with respect to critical environmental

areas in which certain types of mining activities may be inappropriate. Also areas that are protected by law from mineral development must be noted in the plan. The plan also should identify pre-existing rights and claimants who are entitled to reasonable egress and ingress to develop their claim.

The Forest Service has the authority to impose reasonable regulations on mining activities and in certain instances is required to do so. Comprehensive, uniform lease terms might be considered for general application to some mining activities. The Forest Service might determine by regulation which mining activities always must be preceded by an EIS. General guidelines concerning the use and protection of the environment in mining activities also could be developed by regulations. The guidelines would prescribe specific lease terms or controls on uses that require environmental protection and restoration. Guidelines could prohibit any mining activity that unduly interferes with or is incompatible with other uses. They could proscribe any mining activity that is inconsistent with the forest plan based on the multiple-use process.

NOTES

¹⁴42 U.S.C. §§ 7401 *et seq.* (Supp. II 1978). See Chapter II.B.8 *infra* for a more detailed discussion of the Clean Air Act).

²³33 U.S.C. §§ 1251 *et seq.* (1976 and Supp. II 1978). See Chapter II.B.2 *supra* for a more detailed discussion of the Clean Water Act).

³⁰30 U.S.C. §§ 21-47 (1976).

⁴⁶46 U.S.C. § 478 (1976).

⁵⁰30 U.S.C. §§ 181-287 (1976).

⁶*Id.* at § 181.

⁷*Id.* at §§ 611-15.

⁸*Id.* at §§ 351-59.

⁹*Id.* at §§ 201, 202a, 208-1 and 208-2.

¹⁰*Id.* at § 201(a)(3)(E).

¹¹30 U.S.C. §§ 1201 *et seq.* (Supp. II 1978).

¹²See Chapter IV *infra* for a more detailed discussion of NEPA, 42 U.S.C. §§ 4321 *et seq.* (1976).

¹³*Jette v. Bergland*, 579 F.2d 59 (10th Cir. 1978).

¹⁴See *South Dakota v. Andrus*, 462 F. Supp. 905, 12 ERC 1765 (D.S.D. 1978), *aff'd*, 614 F.2d 1190, 14 ERC 1166 (8th Cir.), *cert. denied*, 101 S. Ct. 80, 14 ERC 2208 (1980).

¹⁵*Natural Resources Defense Council, Inc. v. Berkland*, 458 F. Supp. 925, 12 ERC 1146 (D.D.C. 1979).

¹⁶*Id.* But see *contra* *South Dakota v. Andrus*, 462 F. Supp. 905, 12 ERC 1764 (D.S.D. 1978), *aff'd*, 614 F.2d 1190, 14 ERC 1166 (8th Cir.), *cert. denied*, 101 S. Ct. 80, 14 ERC 2208 (1980).

¹⁷ Sierra Club v. Hathaway, 579 F.2d 1014 (10th Cir. 1978).

4. Range*

Livestock grazing was an established use of the public range for years prior to the establishment of the national forest reserves.¹ Grazing continued on the public lands that became national forest reserves even though it was ostensibly prohibited under the Forest Reserve Act of 1891.² After transfer of the forest reserves on 1905 to the Department of Agriculture,³ the Forest Service accepted the accomplished fact of grazing on the national forests but asserted the power to regulate it. Under the authority of the 1897 Act "to regulate their [the national forests] occupancy and use and to preserve the forests thereon from destruction,"⁴ the Forest Service initiated a permit and nominal fee system at the start of the 1906 grazing season. Its authority to do so under the 1897 Act was upheld by the United States Supreme Court in *United States v. Grimaud*⁵ in 1911. Under its statutory authority, the Forest Service has been afforded wide discretion to regulate grazing in the national forests.⁶ Grazing as a permissible use of Forest Service lands was expressly recognized by the Granger-Thye Act of 1950⁷ and the Multiple-Use Sustained-Yield Act of 1960.⁸

(a) Permits and Leases

There are currently two major statutory authorizations relating to the issuance of permits and leases for grazing use of national forest land: the Granger-Thye Act⁹ and the Federal Land Policy and Management Act of 1976 (FLPMA or the BLM Organic Act)¹⁰ as amended by the Public Rangelands Improvement Act of 1978.¹¹ Under the Granger-Thye Act, permits can be issued for terms of not more than ten years. The Secretary is directed to include such terms and conditions in the permits as he deems necessary for the proper management of the land.¹² FLPMA deals with grazing on both BLM and NFS lands in the sixteen contiguous western states.

Permits or leases issued under the authority of BLM Organic Act are to be for a period of ten years.¹³ A grazing permit may be issued for a shorter period only if: (1) the land is pending disposal, (2) the land is to be devoted to another public purpose before the end of ten years, or (3) a shorter period is necessary for sound land management.¹⁴

The provisions of the Granger-Thye Act and FLPMA concerning the term of the permit are not inconsistent. Both establish that a permit for grazing will be for ten years. The distinction that should be noted is that FLPMA applies only to those lands located within the sixteen contiguous

western states. Thus, as acknowledged by the Department of Agriculture in its regulations,¹⁵ livestock grazing permits in the sixteen contiguous western states must be for a period of ten years unless one of the three conditions is met.

Under FLPMA, grazing permits can be cancelled by the Forest Service when the land is to be devoted to another public purpose. Except in an emergency, the Forest Service must give the permittee two years notice of the cancellation.¹⁶ The permittee or lessee must be paid the adjusted value of his interest in any permanent improvements that he has placed on or made to the land. Those permits issued for NFS lands in the sixteen western states have a special condition attached to them. When they expire and the same land is to be leased for grazing use again, the holder of the permit during the first period must be given first priority for receipt of the new permit. The same permittee can take the new permit if he is willing to be governed by any new conditions which are incorporated in the new permit.¹⁷

(b) Allotment Management Plans

Permits or leases for grazing on NFS lands in the sixteen contiguous western states will, in general, be required to contain an allotment management plan for the land covered by such instrument. An allotment management is a document, prepared through consultation with the land users, which contains a prescription for use of range land for grazing purposes.¹⁸ It specifies (1) how livestock operations conducted on land will be consistent to the principles of multiple-use and sustained-yield and take into consideration economic and other need of the land, (2) the type, location, ownership, and general specifications for range improvements to be installed and maintained on the lands, and (3) any other provisions relating to livestock grazing operations or other objectives which the Secretary finds to be consistent with other provisions of law. The plan is not to refer to non-federal lands except where the lands are intermingled or the lessee has consented.¹⁹ Under most circumstances allotment management plans must be developed with some public participation in the form of group advisory boards.

The date for incorporation of allotment management plans in all grazing permits is October 1, 1988. However, incorporation of allotment management plans is not mandatory; the Secretary may determine that such a plan is "not necessary for management of livestock operations."²⁰ Instead of allotment management plans, however, the Secretary must include such terms as are appropriate for management of the lands in question in accordance with law including at least (1) the number of animals to be grazed on the land, (2) the seasons to be used for grazing, and (3) permission for the Secretary to reexamine the lands and make modifications in the permit depending upon changed conditions.

* The notes for subsection 4 begin on p. 60.

(c) Grazing Fees

The subject of grazing fees has long been controversial. At the root of the controversy is the issue whether a "fair market value" rental fee should be charged for use of public grazing lands. The stated policy of FLPMA is receipt of fair market value "unless otherwise provided for by statute."²¹ FLPMA directed that a joint study be made by the Secretaries of Agriculture and Interior in 1977 (with a view to establishing a fee) and that proposals be made to Congress upon completion.²² The study was to recommend grazing values that were "equitable to the United States and to the holders of grazing permits and leases on such lands." Consideration was to be given to production costs, differences in forage values, and other factors relating to "reasonableness" of the fees. A moratorium was placed on fee increases pending completion of the report.

The joint task force proposed that fair market value determinations should be based on the Western Livestock Grazing Survey of 1966, as updated annually in relation to private grazing land lease rates. Grazing fees should be increased to fair market value, excluding consideration of permit costs, but limited to a present yearly increase of no more than twenty-five percent of the preceding year's rates. After reaching fair market value yearly charges should be increased by no more than twelve percent of the previous year's fee, and under specific conditions, a fee should be established for yearlings. In addition, the Task Force proposed that private leases should be collected, refined, and evaluated to use in determining the public grazing leases.²³

Finally, the Public Rangeland Improvement Act established a formula that will be computed in part from the cost of beef production and sales price; the fee will fluctuate with the overhead expenses and prices received in the cattle industry.²⁴

(d) Range Betterment Funds

Expenditure of money received for grazing on NFS lands is covered by two separate statutes. Each specifies amounts to be withheld for improvements on rangeland. The earlier provisions of the Granger-Thye Act²⁵ provide for a special fund to be maintained by collection of two cents per animal per month for sheep and goats, and ten cents a month for all different types of livestock grazed on NFS lands. This fund is to be used for range improvements in the national forest from which it was appropriated for the following purposes: (1) artificial revegetation, (2) fences, watering places for livestock, bridges, corrals, and other necessary range improvements, (3) rodent control, and (4) poisonous plant and noxious weed control. Under FLPMA one-half of that fund (one quarter of the total collected) must be spent in the district from which the funds were collected and the other half (one quarter of the total) is to be spent as the Secretary of Agriculture shall direct.²⁶ This fund originating under the BLM Organic Act can be spent

for all forms of rangeland betterment. Rangeland betterment is defined in the Act as including but not being limited to: seeding, reseeding, fence construction, weed control, water development, and fish and wildlife habitat enhancement. In determining how these funds will in fact be spent, the Secretary is directed to consult with the user representatives of the rangelands.

The funds which are received under the Granger-Thye Act for rangeland in the eastern states is the sole fund to be available for the eastern states rangelands. Those monies received and set aside under FLPMA for the sixteen contiguous western states, however, are to be used in addition to the money which is set aside under the Granger-Thye Act. It should be further noted that the appropriations authorized by the Granger-Thye Act are specifically continued under FLPMA.²⁷ Thus, for Forest Service range in the sixteen contiguous western states the two or ten cents to be set aside under the Granger-Thye Act and at least one-fourth of the receipts received for grazing on those lands will be available for range improvements. Rangeland in the eastern states will have the two or ten cents which is collected for grazing use in those eastern states but only the possibility of improvement assistance from one-fourth of the receipts received for grazing use of the NFS lands in the sixteen contiguous western states.

The Secretary of Agriculture also is authorized to expend funds which have been appropriated for protection and management of the national forest to make rangeland improvements on non-federal lands. This expenditure is limited to lands which are intermingled with or adjacent to NFS lands. The Secretary also is given authority to lease this non-federal land for periods of up to 20 years.²⁸ Before funds can be expended for improvements on non-federal lands, the Forest Service must have control over the land for sufficient period to justify these expenditures. The type of improvements authorized on non-federal lands are seeding and protective fencing. These payments for improvements on non-federal land are limited to no more than 1,000 acres which would be in the ownership of a single person or entity, and no more than 25,000 acres total per year.

(e) Grazing Advisory Boards

There are two statutory authorizations for grazing advisory boards, the Granger-Thye Act and the BLM Organic Act. The Granger-Thye Act provides for grazing advisory boards to be established for any national forest or other local unit when the grazing permittees of that area have requested the establishment of such a board by a majority vote. In such case the Secretary of Agriculture must establish the board, which will be composed of from three to 12 permittees, elected by all the permittees in the region, and one person appointed by the state game commissioner. Granger-Thye boards are to make recommendations to the Secretary

of Agriculture on: (1) regulations for national forest land use, (2) seasons of grazing use on national forest lands in the region, (3) the grazing capacity of the land in that region, and (4) other administrative matters affecting the local grazing area.²⁹

Once the local permittees have requested that the board be established and the board has been established, the Secretary of Agriculture must give notice to that board of new or proposed regulations under §§ 490, 500, 504 and 504a, 555, 557, 571c, 572, 579a, 580c to 580l, or 581 of Title 16.³⁰ When regulations for grazing use of NFS lands are to be modified in a manner that "substantially affects" the existing grazing policy or the preferences of permittees, the grazing advisory boards must be given at least 30 days' notice by the Secretary of Agriculture. When an advisory board makes a recommendation to the Secretary of Agriculture on proposed regulations and that recommendation is not adopted, the Secretary must furnish the boards with written reasons for the action. The one qualification in the statute for the continuation of an advisory board is it must meet at least once a year.³¹

The grazing advisory boards authorized by FLPMA have a specific purpose and a limited life. These boards are to make recommendations and to advise the Forest Service concerning the betterment of allotment management plans and the utilization of range betterment plans. These boards are to exist only until December 31, 1985.³² The statute authorizes grazing advisory boards only for the purposes just outlined in national forests of the sixteen contiguous western states which have jurisdiction over more than 500,000 acres of land that is subject to commercial livestock grazing. The apparent effect would be to preclude the existence of grazing advisory boards under FLPMA for NFS lands.

The FLPMA grazing advisory boards are to be established in the same manner as those under the Granger-Thye Act; that is, a majority of the permittees in the area covered must petition the Secretary for the establishment of the board. The Secretary of Agriculture must then call for an election of members to the board. The number of advisors is within the Secretary's discretion, and there is no condition for an appointed member of the board as was provided under the Granger-Thye Act.

The mandate in FLPMA concerning range rehabilitation should be read with the NFMA mandate concerning reforestation and revegetation. Important tasks for the land planner will be to determine the respective suitability of lands for range as opposed to timber management and to decide in which areas grazing and timber production are compatible. These determinations will in turn affect the program of reforestation/revegetation that is appropriate.

NOTES

¹See generally W. VOIGT, PUBLIC GRAZING LANDS 3-40 (1976); Cox, Deterioration of Southern Arizona's Grasslands: Effects of New Federal Legislation Concerning Public Grazing Lands, 20 ARIZ. L. REV. 697, 712-15; Scott, The Range Cattle Industry: Its Effect on Western Land Law, 28 MONT. L. REV. 155 (1967).

²16 U.S.C. § 471 (1976).

³Transfer Act of 1905, id. at §§ 472, 524, 554, § 554a (1976).

⁴16 U.S.C. § 551 (1976); W. VOIGT, supra note 1, at 45-48.

⁵220 U.S. 506 (1911).

⁶See, e.g., Perkins v. Bergland, 455 F. Supp. 937 (D. Ariz. 1978).

⁷16 U.S.C. § 580h (1976).

⁸Id. at § 528.

⁹Id. at § 580h.

¹⁰Pub. L. No. 94-579, 90 Stat. 2743 (1976), codified in part, 43 U.S.C. §§ 1701-82 (1976).

¹¹Pub. L. No. 95-514, 92 Stat. 1803 (1978).

¹²16 U.S.C. § 580l (1976).

¹³43 U.S.C. § 1752(a) (1976).

¹⁴Id. at § 1752(b).

¹⁵36 C.F.R. § 222.3 (1978).

¹⁶43 U.S.C. § 1752(g) (1976).

¹⁷Id. at § 1752(c).

¹⁸Id. at § 1702(k).

¹⁹Id. at § 1752(f).

²⁰Id. at § 1752(e).

²¹Id. at § 1701(a)(9).

²²Id. at § 1751.

²³See Cox, supra note 1, at 718-21.

²⁴Pub. L. No. 95-514, 92 Stat. 1803 (1978).

²⁵16 U.S.C. § 580h (1976).

²⁶43 U.S.C. § 1751(b)(1) (1976).

²⁷Pub. L. No. 94-579, 90 Stat. 2743, § 701(j) (1976).

²⁸16 U.S.C. § 580g (1976).

²⁹Id. at § 580k(c)(2).

³⁰Id. at § 580k(c)(1).

³¹Id. at § 580k(a)(4).

³²43 U.S.C. § 1753 (1976). The Grazing Advisory Boards established under FLPMA apparently are in addition to those existing or which are authorized under the Granger-Thye Act. This is indicated by the fact that the boards authorized by FLPMA have a very particular purpose, whereas the Granger-Thye boards are to advise the Secretary on general subjects. Secondly, the FLPMA

boards have a limited life span which would not seem to preempt the boards' authority under the Granger-Thye Act. Finally, there is no mention of repeal of those provisions of the Granger-Thye Act which relate to advisory boards. FLPMA specifically states that no statute is to be repealed by that Act by implication. The Forest Service, however, apparently has eliminated the Granger-Thye grazing advisory boards. Regulations issued by the Forest Service and Department of Agriculture on October 28, 1977, have changed the structure of grazing advisory boards to conform with the provisions of FLPMA. See 36 C.F.R. § 222.11, 42 Fed. Reg. 56,735 (October 28, 1977).

³³ See Section II.B.1 *supra*.

5. Plant and Wildlife*

(a) Endangered Species Act of 1973

Congressional efforts to preserve and protect the natural environment also are evidenced in the Endangered Species Act.¹ That Act reflects congressional concern over the impact of human activities and technology on the natural environment, particularly animal, fish, and plant life.

The congressional scheme for preservation of endangered species first entails identification of those species whose continued existence is either threatened or endangered. Elaborate administrative procedures are imposed upon the Secretary of Interior who has the task of finally declaring a list of "threatened" or "endangered" species.² The next step in the program is preservation and conservation of those species. This is done through prohibition of any activities that directly cause extinction of the species, such as killing or taking the animals. It also prevents indirect activities, such as sale and commerce in the species or products from the species which could lead to their extermination.³ The Act, in addition, prohibits any federal activity which would directly threaten continued existence of an endangered species or its habitat.⁴

The Forest Service could be involved with the Endangered Species Act principally in two ways. The first is in cooperating with the Secretary of Interior by providing information concerning the list of threatened and endangered species. Under the Act all federal agencies are required to cooperate with the Secretary of Interior in carrying out the purposes of the Act. Specifically in the provisions for creation of the list of endangered species, consultation by the Secretary of Interior with interested federal agencies is required.⁵ Consistent with the preservation and conservation objectives of the Act, the Forest Service should cooperate extensively with the Secretary of Interior in determining the list of species to be included. Specific input from the Forest Service

could be quite important with respect to fish, plants, and wildlife on NFS lands.

The Act imposes other obligations that directly affect management activities concerning the use of national forest lands. The Forest Service must regularly obtain the list of endangered or threatened species from the Department of Interior. With respect to any species so listed the Forest Service is obligated to take whatever action is needed to conserve those species.⁶ This action may take the form of regulating hunting and fishing, grazing, or other activities that may threaten a plant or animal species.

The Forest Service, as with all agencies, also must take immediate steps to assure that its activities in no way jeopardize the continued existence of a species or its habitat.⁷ The obligation imposed under this requirement goes beyond merely identifying whether threatened or endangered species are present in the area where the proposed activity is being undertaken. It requires that specific studies be undertaken to determine that the species or its habitat is not threatened directly by the activity. When planning its activities, an agency must identify whether endangered or threatened species or their critical habitats are present in the area where the activity will be undertaken. If the existence of the species or its critical habitat would be affected by the federal activity, that activity must be stopped.⁸ This requirement is a continuing one and would apply to ongoing activities as well as proposed ones. Thus it requires that the Forest Service be aware of any change in circumstances or conditions that might result in the activity jeopardizing an identified species. At that time steps must be taken immediately to protect the species and avoid the harm. Preservation and protective steps must be included in the project so that the species and its habitat will not be jeopardized. A proposed activity cannot be commenced or continued unless mitigation and enhancement are incorporated into the project. An agency like the Forest Service must show that its activity will in fact in no way adversely affect the species or its habitat. The plan and proposal should show that no plant or animal species or habitat will be harmed by the project.

In this manner the Endangered Species Act imposes affirmative obligations on the Forest Service and other federal agencies. An agency may not respond passively to the list promulgated by the Secretary of Interior, but rather must take affirmative steps to consult with the Secretary of Interior and to adapt the agency's programs to further conservation efforts of threatened or endangered species. This obviously may mean undertaking steps to locate the species and provide additional protective measures for that area. Because the list is constantly changing, it is imperative that an agency have the current list of threatened and endangered species and regularly review its ongoing activities that could potentially affect any species on the list. An agency

* The notes for subsection 5 begin on p. 65.

cannot wait until its action directly affects and eventually harms the species or habitat. It must gather information about the species, its location, and the potential for harm and then take the mitigating steps to assure that no activity will directly harm the species.

A recent Supreme Court case illustrates the latter obligation most vividly. In *TVA v. Hill*⁹ the federal agency was prohibited from filling a dam which was almost completely constructed in order that the habitat of the snail darter, a newly discovered species, be preserved. The United States Supreme Court held that the Endangered Species Act imposes a duty on the agency other than merely to locate the species, the potential harm, and notify the Secretary of Interior. The Act requires the agency to undertake steps to protect the endangered species and its habitat, and if relocation is not possible, then to avoid the action which would destroy the species, here filling the dam. Hence, an entire multi-million dollar water resources project was stopped pending a determination and study to ascertain how the species might be preserved. Although *Hill* may be an extreme case factually, it nonetheless illustrates the responsibility imposed on federal agencies under the Act.

In addition, the Act, by requiring all agencies to further its purposes, suggests that the agency may not wait until a species has been identified by the Department of Interior. If an agency is aware of a lessening in the number of a species or a particular problem concerning the species or its habitat, this information must be brought to the attention of the Secretary of Interior. The preservation of species is the paramount obligation under the Act, and all steps have to be taken by the agency with that objective in mind.

*National Wildlife Federation v. Coleman*¹⁰ re-inforced the Act's mandatory duties imposed on agencies. In that case the question was whether the Department of Transportation had taken sufficient action to protect the habitat of the sandhill crane from destruction by a proposed interstate highway. The court reversed the trial court's finding that adequate consideration to the habitat and the danger threatening the crane had been given by the highway department. The court held that the Act "imposes on federal agencies the mandatory duty to insure that their actions will not either (i) jeopardize the existence of an endangered species, or (ii) destroy or modify critical habitat of an endangered species."¹¹ The court went on to state that under the Act it is not sufficient that the threatened harm was reported to the Department of Interior. According to the court, the Interior Department is not given veto power over actions of another agency. Rather it is for the agency proposing the action to consider whether it has taken the steps required under the Act to protect the species before undertaking the project. The court concluded that the trial court erred in holding that the Department of Transportation had adequately considered the effect

of the highway on the sandhill crane. That was insufficient to satisfy the mandatory duty imposed by the Act. The court granted injunctive relief to enjoin further work on the project until adequate steps had been taken to ensure that the proposed action would not harm the sandhill crane or its habitat.

Under the Endangered Species Act enforcement against individuals by civil penalties is also authorized. Fines may be imposed by the Secretary of Interior for violations relating to commercial activity.¹² The Forest Service may get involved in enforcement actions if criminal violations have occurred. If the violation is by a licensee or permittee under a license or permit for the use of public lands within the jurisdiction of the Forest Service, the Forest Service may modify, suspend, or revoke the license or permit.¹³ The Forest Service is also authorized to enforce the Act by detaining and inspecting devices that may be carrying animals acquired contrary to the Act. Also the Forest Service may make arrests without warrants for violations of the Act when the violator has been observed committing the violation. The Forest Service may also execute arrest or search warrants issued by a court for violations of the Act. That authority includes authorizing searches and seizures of individuals and property pending disposition of the case.

(b) Endangered Species Act Amendments of 1978

In November 1978 Congress amended the 1973 Act by enacting the Endangered Species Act Amendments of 1978.¹⁴ The Amendments did not change the basic duties of agencies under the 1973 Act, but clarified the responsibilities it imposed and added an exemption provision under certain circumstances. Under the Amendments an agency must request information from the Department of Interior on whether any species listed or to be listed is in the area of the proposed action. If the advice of the Interior Department is affirmative, the agency must conduct a "biological assessment" on the listed species located in the area where the proposed action will be conducted. The assessment must be completed within 180 days or a date mutually agreed to by the Department of Interior and the agency and must be completed before any contract for construction or any construction is begun on the proposed action. The assessment may be done as part of the agency's NEPA responsibilities.¹⁵

An agency also is prohibited from making any irreversible or irretrievable commitment of resources which might foreclose "prudent and reasonable alternatives" to avoid or mitigate the harm to the species. Under the Amendments "alternative courses of action" that must be considered include all alternatives and are not limited "to the original project objectives and agency jurisdiction." The same prohibition applies to a permit or license applicant.¹⁶

An agency may proceed with a project that might jeopardize a species or its habitat if an exemption is granted from the requirements of the Act. The Amendments allow the agency, an affected state, or an applicant to apply to the Secretary of Interior within 90 days after completing the required consultation for an exemption of the agency's action that may jeopardize the continued existence of a threatened or endangered species or its habitat. The application is first considered by a review board which prepares a report for the Endangered Species Committee which makes a final determination on the exemption application.

The review board is composed of a person named by the Secretary of Interior, another named by the President (a resident of any state affected by the proposed action), and an administrative law judge. The Secretary must submit the application and the Secretary's written views and recommendations on it to the review board. By majority vote the board must determine whether (1) an irresolvable conflict exists, and (2) the exemption applicant performed its statutory responsibilities in good faith, including consulting with other agencies, developing and considering modifications and reasonable and prudent alternatives to avoid harm to a species or its habitat, conducting the biological assessment, and refraining from any irretrievable commitment of resources. If the review board's determinations are positive, it then must report on the availability of reasonable and prudent alternatives, and the nature and extent of the benefits of the proposed action and of alternative courses of action consistent with conserving the species and its habitat. The report must summarize the evidence concerning whether the agency action is in the public interest and is of national or regional significance. It also must discuss appropriate reasonable mitigation and enhancement measures for the committee to consider. Depending on the statutory time constraints, hearings may be conducted by the review board.¹⁷

The final determination on an exemption must be made by the Endangered Species Committee, composed of the Secretary of Agriculture, the Secretary of the Army, the Chairman of the Council of Economic Advisors, the Administrator of the Environmental Protection Agency, the Secretary of Interior (chairman), the Administrator of the National Oceanic and Atmospheric Administration, and a person from each affected state named by the Secretary of Interior. The Committee by a personal vote of five members may grant an exemption for a project if it determines (1) no reasonable and prudent alternatives exist to the agency action; (2) the action's benefits outweigh the benefits of alternative actions that conserve the species or its habitat; and (3) the action is in the public interest and is of national and regional significance. The committee's exemption must be based on the board's report, the record, and other evidence it receives. Any exemption must specify mitigation and enhancement measures required to be done at the applicant's cost. These

costs, however, are not to be project costs for purposes of a cost/benefit ratio for the proposed action.

To be permanent with respect to the species concerned in the proposed action, the exemption must be preceded by a biological assessment. If the Secretary of Interior finds an exemption would cause the extinction of a species, the exemption is not permanent. The committee must determine within 30 days of the Secretary's finding whether to grant the exemption notwithstanding that finding. The exemption decision is not major federal action within the meaning of NEPA.¹⁸

Thus, the Amendments elaborate on the consultative process under the Act and add an exemption procedure. Noteworthy is the fact that the Amendments do not lessen the Act's conservation requirements, but recognize that in limited cases other factors may justify undertaking an activity with maximum mitigation and enhancement measures. The two exemption cases subsequent to the Amendments produced mixed results. After review by the committee, the Tellico Dam was still not allowed to continue because of its unfavorable cost/benefit analysis and the potential destruction of the snail darter. The Grayrocks Project, however, was allowed to be built after a multimillion dollar trust fund was set up to rebuild, relocate, and protect the whooping crane's habitat that was threatened. Ultimately, the Tellico Dam was completed by a special congressional authorization.

(c) Protection of Bald and Golden Eagles Act

The Forest Service also is involved with protecting animal species under particular acts directed towards specific animals. The Protection of Bald and Golden Eagles Act²⁰ imposes obligations on federal agencies with respect to preserving eagles. In order to protect eagles the Act prohibits the taking, killing, selling, or transporting of bald and golden eagles. Civil and criminal penalties are imposed for those convicted of violating the Act.

The Secretary of Agriculture and the Forest Service become involved under the enforcement provision of the Act. The Act generally is to be implemented and enforced by the Secretary of Interior. However, the Act authorizes cancellation of leases, licenses, permits, or other agreements authorizing the grazing of domestic livestock on federal land if the person having the authority to use the land commits a violation of the Act. Similarly, cancellation is authorized if the person having the authority to use the land commits a violation of regulations or rules issued by the Secretary of Interior pursuant to the Act. Thus the Forest Service does have the authority to cancel or revoke grazing permits for violations of the Act.

Other obligations have been imposed under the Act. Under Executive Order No. 11643 the heads

of federal agencies are authorized to take steps to restrict the use of chemical toxicants. Agencies must limit the use of chemical toxicants on federal lands or in federal programs for mammal or bird damage control. The mandate to regulate under executive orders applies to all federal agencies and is intended to implement the Endangered Species Act and the Protection of Eagles Act.²¹

In one case a citizens' group was unsuccessful in bringing a private suit to enforce the Protection of Eagles Act. In Citizens Against Toxic Sprays, Inc. v. Bergland²² the court stated that the Protection of Eagles Act did not expressly provide a remedy for private parties to enforce the Act. The court held that the evidence failed to show that a violation of the Act occurred. Hence, it was not necessary for the court to decide if the Act implies a civil remedy for violations in addition to enforcement through the Secretary of Interior and other federal agencies.

(d) Wild and Free-Roaming Horses and Burros Act

Other groups of animals that are protected by specific legislation are wild and free-roaming horses and burros. Congress, in the Wild and Free-Roaming Horses and Burros Act,²³ declared the policy to preserve these animals as symbols of the historic and pioneer spirit of the West. The method adopted by Congress to avoid extinction of these animals is to protect them from capture and killing and to regulate and manage where the animals are maintained. With respect to lands administered by the Bureau of Land Management, the Act is administered by the Secretary of Interior; with respect to lands administered by the Forest Service, the Act is administered by the Secretary of Agriculture.²⁴

The Act gives jurisdiction over the wild and free-roaming horses and burros to the Secretary for the lands in which the animals are located. The appropriate Secretary is required to protect and manage these animals on public lands by designating and maintaining particular ranges as sanctuaries for those animals. The agency is directed to maintain the animals on ranges compatible with other uses of the area. The agency is to work with the local state and wildlife officials in managing the animals and to engage in minimum management practices with respect to them.

Under the Act killing the animals is prohibited except with the authority of and in the manner prescribed by the appropriate Secretary. The Act urges relocation of animals from over-populated areas rather than destruction of the animals. The Act prohibits killing the animals if they roam on private lands. Private parties may maintain the animals if they do so in a manner compatible with the purposes and objectives of the Act. Moreover, if private parties claim title to the wild and free-roaming horses and burros, they may acquire ownership rights only if it is authorized under the appropriate state law.²⁵

The Act prescribes criminal penalties for its violations. The Act is violated if persons remove animals from public lands, convert the animals to private use, kill or harass them, process or permit them to be used as commercial products, or sell the animals from private land.

The Wild and Free-Roaming Horses and Burros Act has been constitutionally challenged judicially on one occasion. In that case the United States Supreme Court upheld the constitutionality of the Act. In Kleppe v. New Mexico²⁶ the United States Supreme Court noted that the Act is an appropriate exercise of congressional authority over public lands under the property clause of the Constitution, article IV, § 3, cl. 2. That clause carries with it the power to regulate and control wildlife and animals living on the land.

Two other cases have dealt with the management powers of the federal agencies under the Act. In American Horse Protection Ass'n v. Frizzell²⁷ the district court concluded that the management powers are basically discretionary under the Act. It concluded that the BLM had the authority to determine when range was overgrazed and that reducing the horse population would be necessary to preserve it. The court also upheld the cooperative agreement between the Bureau of Land Management and the State of Nevada under which the round ups of the horses were conducted. However, in American Horse Protection Ass'n v. Dep't of Interior²⁸ the court concluded that delegation of mandatory duties under the Act by a federal agency to a state agency was improper. In that case the BLM had effectively delegated to the state the responsibility to determine ownership of wild horses and burros. The court concluded that the statutory obligation to determine ownership of horses and burros on federal lands was imposed on the agency that had jurisdiction over the land. That was a mandatory duty imposed by the statute and could not be delegated to a state agency, even though the issue of ownership is determined by state, not federal, law.

(e) Fish and Wildlife Coordination Act

Another statute requiring conservation and planning in conjunction with other federal agencies is the Fish and Wildlife Coordination Act (FWCA).²⁹ The Act requires that an agency give equal consideration to wildlife conservation in planning and approving water resource development projects. An agency must coordinate its planning for water resource development projects with the Fish and Wildlife Service (FWS) and must consult with the FWS on any impoundment, channelization, diversion, or other modification project on a body of water. The agency also must consult with the appropriate state agency having jurisdiction over wildlife. In light of this consultation, the agency must consider and adopt appropriate mitigation measures to minimize the harm to fish and wildlife. The Act prohibits the harmful conduct by either the agency or by its licensee or permittee.

The Act authorizes project modification and land acquisitions when necessary for the conservation and preservation objectives.

The Act has been construed by the courts to provide a separate basis of authority for the Corps of Engineers to deny a dredge and fill permit in navigable waters. In *Zabel v. Tabb*³⁰ the Corps denied a dredge and fill permit application for ecological reasons, citing the Fish and Wildlife Coordination Act, even though the work did not interfere with navigation, flood control, or production of power, the traditional reasons for the Corps denying a permit. The court upheld the Corps' authority under the Act. In another case wildlife conservation had to be considered by the former Federal Power Commission in acting on an application for a hydroelectric power plant. Again the court relied on the Fish and Wildlife Coordination Act as the source of the obligation.³¹

The courts have noted that the requirements of the FWCA are in addition to, and independent of, obligations imposed by other statutes such as NEPA.³² Thus, the agency's preparation of an adequate EIS under NEPA does not necessarily satisfy the requirements of FWCA. The agency must still show that the required consultation and mitigation plan were done. However, an agency can do the required consultation and planning during the NEPA EIS preparation and satisfy both statutes in one document if the agency clearly identifies its obligations under both statutes and its compliance with them in the final document, i.e., the final EIS.³³

NOTES

¹16 U.S.C. §§ 1531-43 (1976), as amended by the Endangered Species Act Amendments of 1978, Pub. L. No. 95-632, 16 U.S.C. §§ 1531 *et seq.* (Supp. III 1979).

²16 U.S.C. § 1533 (1976).

³*Id.* at § 1538.

⁴*Id.* at § 1536.

⁵*Id.* at § 1533(b).

⁶*Id.* at § 1536.

⁷*Id.*

⁸*Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978).

⁹*Id.*

¹⁰529 F.2d 359 (5th Cir.), *cert. denied*, 429 U.S. 979 (1976).

¹¹529 F.2d at 371.

¹²16 U.S.C. § 1540 (1976).

¹³*Id.* at § 1540(b)(2).

¹⁴Pub. L. No. 95-632 (Nov. 10, 1978).

¹⁵16 U.S.C. § 1536(c) (Supp. III 1979).

¹⁶*Id.* at § 1536(d).

¹⁷*Id.* at §§ 1536(g)(5)-(9).

¹⁸*Id.* at § 1536(k).

¹⁹BNA ENVT'L REP. (Curr. Dev.) 1970 (Feb. 16, 1979).

²⁰16 U.S.C. §§ 668-668(d) (1976).

²¹Exec. Order No. 11,643, 37 Fed. Reg. 2875 (1972), as amended by Exec. Order No. 11,870, 40 Fed. Reg. 30,611 (1975) and No. 11,917, 41 Fed. Reg. 22,239 (1976).

²²428 F. Supp. 908 (D. Ore. 1977).

²³16 U.S.C. §§ 1331-40 (1976).

²⁴*Id.* at § 1333(a).

²⁵*Id.* at § 1335.

²⁶426 U.S. 529 (1976).

²⁷403 F. Supp. 1206 (D. Nev. 1975).

²⁸551 F.2d 432 (D.C. Cir. 1977).

²⁹16 U.S.C. §§ 661-666c (1976).

³⁰430 F.2d 199 (5th Cir. 1970).

³¹*Udall v. Federal Power Commission*, 387 U.S. 428 (1967).

³²430 F.2d 199 (5th Cir. 1970); *Akers v. Resor*, 339 F. Supp. 1375 (D. Tenn. 1972); *Nat'l Wildlife Fed'n v. Andrus*, 440 F. Supp. 1245 (D.D.C. 1975); *Texas Committee on Natural Resources v. Alexander*, ___ F. Supp. ___, 12 ERC 1676 (E.D. Tx. 1978).

³³*E.g.*, *Environmental Defense Fund, Inc. v. Corps of Engineers*, 325 F. Supp. 749 (E.D. Ark. 1971) (*Gillham Dam Project*).

6. Recreation*

(a) Off-Road Vehicles

Executive Order 11644,¹ amended by Executive Order 11989,² dealing with the use of off-road vehicles on public lands, involves consideration of the Noise Control Act in its directions to federal agencies. The purpose of the Executive Order was to "ensure that the use of off-road vehicles on public lands will be controlled and directed so as to protect the resources of those lands"³ Pursuant to this Order, guidelines have been formulated for use by the Forest Service in designating trails and areas for off-road vehicle use.⁴ With respect to noise produced by off-road vehicles, "areas and trails shall be located to minimize harassment of wildlife or significant disruption of wildlife habitats."⁵ Also, areas and trails must be located so that the use of off-road vehicles is compatible with other recreational uses of the land. This compatibility must not interfere "with existing conditions in populated areas, taking into account noise and other factors."⁶ This provision of the rules prohibits the Forest Service from designating off-road vehicle trails near improved

* The notes for subsection 6 begin on p. 68.

campgrounds or near communities which are located in or near national forests. Areas and trails should also be located where they will minimize damage to soil, watershed, and other forest resources.⁷ Off-road vehicle areas or trails cannot be located in a wilderness or primitive area.⁸

Public participation is invited in designating trails and areas for off-road vehicle use.⁹ If the Forest Service believes that such designations have an adverse impact upon the ecological balance of the surrounding forest, the trails and areas may be closed for up to one year in order to protect the natural resources.¹⁰ The Forest Service shall make available to the public the regulation of off-road vehicles, time periods for use and non-use, and type of vehicle regulated.¹¹ The Forest Service will monitor the impact of off-road vehicle use and close all areas or trails where adverse effects have been noted.¹² Forest supervisors will annually review off-road vehicle management plans and revise such plans after the public is given an opportunity to participate.

(b) Land and Water Conservation Fund Act

According to the Senate Report on the Land and Water Conservation Fund Act,¹³ the purpose of the Act was to "help the states and federal agencies meet the ever-increasing needs and demands, present and future, of the American people for lands and facilities for outdoor recreation."¹⁴ Pursuant to this legislative purpose, Congress set up a fund from which states, on a matching fund basis, and federal agencies could draw for planning and acquisition of land and water areas, and for outdoor recreation and for construction of related facilities. The Forest Service was specifically included in the federal agencies authorized to draw from this fund.¹⁵

Pursuant to the Act, the funds were originally to be supplied by the sale of any surplus federal real and related personal property, assessment of a federal tax on motorboat fuel, and admission and user fees paid by persons who use outdoor recreation areas and facilities provided by the federal government.¹⁶ Since the Act's enactment, Congress has amended the Act to provide a further source of money from unappropriated Treasury funds in order that the total amount in the fund reach the statutorily authorized amount.¹⁷ If funds are not available from the Treasury to meet this statutory limit, Congress has authorized that funds may be obtained from revenues due and payable to the United States under provisions of the Outer Continental Shelf Lands Act.¹⁸

The public lands for which the fund was created are the NFS, the National Park Service, Corps of Engineers reservoirs, Bureau of Reclamation reservoir areas, and the national wildlife refuges.¹⁹ The fund is available to purchase land for these federal areas through congressional appropriations.²⁰

Forty percent of the fund is reserved for federal use, with the remaining funds to be used by the states.²¹ The legislative history of the Act indicates the specific intention of Congress that money from the fund be used to purchase only land with a primary value for outdoor recreation, rather than for forest products or other forest uses. "This is a recreation bill, and the Committee intends that moneys appropriated from the fund shall be for outdoor recreation purposes."²² The committee also stated that the fund could be used for the construction of facilities in recreation areas of the national forest system.

The Act reflects congressional concern over three major problems facing federal agencies who administer land for recreation purposes. Many federal areas contain inholdings of private land which should be acquired for their recreation value or to improve administration of the federal area. By providing funds to purchase such inholdings, Congress has in part solved this difficulty. Also Congress was concerned with the lack of national recreation areas in the eastern United States, which contain most of the concentrated population centers of the country. To alleviate this disparity between available federal recreation areas and native population trends, Congress provided that a certain amount of the land purchased with money from the fund be used to establish recreation areas in the eastern portion of the United States. The third problem dealt with off-setting the nonreimbursable cost of reservoirs constructed by federal agencies such as the Corps of Engineers and the Bureau of Reclamation. The Act, through its provisions for funding development, and construction of outdoor recreation systems, provided a solution to this problem.²³

The Land and Water Conservation Fund Act has two provisions that are critical to Forest Service planning and management because Forest Service compliance is mandatory. These provisions control Forest Service acquisition of private inholdings of land in national forests and the establishment of a schedule of fees for entrance to national forests and for use of federal recreation facilities located in the NFS.

In using money from the land and water conservation fund, the land to be acquired must conform to certain specifications. The land may be an inholding within wilderness areas of the NFS.²⁴ Inholdings of other areas of national forests as the boundaries of those forests existing on the effective date of the Act or purchase units approved by the National Forest Reservation Commission subsequent to the date of the Act may be acquired if the areas are primarily of value for outdoor recreation purposes.²⁵ Also, either wilderness land or land that has a primary value for recreational purposes outside of a national forest but adjacent to its boundary may be acquired, however, exterior acquisitions may not exceed 3000 acres for each national forest.²⁶

To further its intent that the fund be used for establishing additional areas in the eastern half of the United States, the Act provides that, unless specifically authorized by Congress, only 15 percent of the acreage added to the NFS be west of the 100th meridian.²⁷ The 100th meridian is a line extending from a point that approximately divides North Dakota and extending southward to a point on the Texas-Mexico border that approximately divides Texas. Appropriations allowed for national forest acquisition shall be available, notwithstanding any statutory ceiling on appropriations, to the extent of \$1,000,000 or 10% of the ceiling.²⁸ The Secretary of Interior shall notify the House Committee on Interior and Insular Affairs and the Senate Committee on Energy and Natural Resources, 30 days prior to a planned expenditure exceeding that limit.²⁹

In acquiring land through the use of fund monies, the Act states that the "acquisition must be otherwise authorized by law."³⁰ This language has been construed to mean that "a congressional intent to acquire must be found before Land and Water Conservation Act funds may be spent for acquisition."³¹

In identifying this congressional intent, the district judge stated that Congress has favored the acquisition of private lands within the boundaries of national parks and cited the legislative history of the Land and Water Conservation Fund Act.³² Congress did not require that specific inholdings be designated for purchase before appropriations are made to the Land and Water Conservation Fund. Congress is aware that the appropriations are being used for land acquisitions and the judge felt that this revealed congressional intent that private inholdings be purchased for national parks. As a result, the appropriations made to the Land and Water Conservation Fund fulfill the "otherwise authorized by law" provisions of the Act.³³

The second provision of the Act affecting Forest Service activities is the establishment of a schedule for charging entrance and recreation facility user fees. The fees for entrance to National Recreation Areas and fees for use of sites, facilities, equipment, or services furnished at federal expense must be established by the Chief of the Forest Service or the Chief's delegate.³⁴ However, the Chief must establish fees comparable to those fees charged by other federal agencies who administer national recreation areas.³⁵

Executive Order 11200, issued pursuant to this Act, authorized the Secretary of Interior to set up a fee schedule for use by all other federal agencies administering national recreation areas.³⁶ The Department of Interior has established guidelines for designating areas and facilities for which fees shall be charged and has established a schedule of fees for such areas and facilities.³⁷

According to these guidelines, the Forest Service may establish three types of fees. An entrance fee may be charged either on an annual or

single visit basis. A daily recreation use fee may also be charged for the use of specialized sites, facilities, equipment, or services furnished at federal expense. The Forest Service also may charge a fee for special recreation permits for specialized recreation uses such as group activities, recreation events, and use of motorized recreation vehicles.³⁸

An area at which entrance fees shall be charged must be a unit of the NFS and be administered by the Forest Service primarily for scenic, scientific, historical, cultural, or recreational purposes. The area also must contain facilities provided at federal expense, and it must be of such a nature that the fee collection is administratively and economically practical.³⁹

The conditions considered in assessing an entrance fee to a recreation area should also be considered in charging a fee for the use of a specialized site, facility, equipment, or service related to outdoor recreation.⁴⁰ In addition to these conditions, the Forest Service must also consider whether a substantial federal investment has been made in the facility, whether the facility requires regular maintenance and is characterized by the presence of personnel, or the facility is utilized for the personal benefit of the user for a fixed period of time. At least one of these conditions must be satisfied in order that a fee may be charged.⁴¹

The guidelines list several facilities for which a fee cannot be charged: drinking water, wayside exhibits, roads, overlook sites, visitors' centers, scenic drives, toilet facilities, picnic tables, and boat ramps.⁴² A fee may be charged for boat ramps with specialized facilities or services, such as mechanical or hydraulic boat lifts or other facilities. Also, a campground which otherwise satisfies the conditions to be designated as an area for which recreation fees shall be charged shall not be designated as such unless it has tent or trailer spaces, drinking water, access road, refuse containers, toilet facilities, personal fee collection, reasonable visitor protection, and simple devices for containing a campfire where campfires are permitted.⁴³

Clear notice that a fee is charged must be prominently displayed at each designated area and must be included in any publication distributed at the area.⁴⁴ The Department of Interior has designed a sign to be used at the designated areas.⁴⁵

The Land and Water Conservation Fund Act specifically provided for two types of permits to be issued in lieu of entrance or admission fees. The Golden Eagle Passport is an annual permit allowing the holder and his family or anyone who accompanies him in a single, private, non-commercial vehicle entrance to any NFS area at which a fee is charged. Private, non-commercial vehicle includes any passenger car, station wagon, pickup, camper truck, motorcycle, or other motor vehicle

which is used for private recreation purposes.⁴⁶ Also provided for by the Act is the Golden Age Passport which provides a lifetime permit for United States citizens over 62 to enter designated fee areas free of charge.⁴⁷ This permit will admit the holder and his family or anyone accompanying him in a single, private, non-commercial vehicle.

Any person not possessing a Golden Eagle Passport or a Golden Age Passport may gain entrance at a designated fee area by payment of a fee for a single-visit permit. In establishing such a fee for a specific area, the Forest Service must consider the direct and indirect cost to the government, the benefit to the recipient, the public policy or interest served, the comparable recreation fees charged by other federal and nonfederal public agencies within the service area of the management unit at which the fee is charged, the economic and administrative feasibility of fee collection, and any other factors pertinent to the assessment of an entrance fee for that specific area.⁴⁸ Two separate permits may be issued for those visitors who enter by private, non-commercial vehicle and for those who enter by means other than a private, non-commercial vehicle.⁴⁹

The Department of Interior has established a schedule of fees to be charged for use of specialized facilities which all administering bureaus of the Department of Interior must consult in assessing such fees.⁵⁰ In establishing a particular fee, the same conditions considered for establishing entrance fees for single-visit permits⁵¹ must be taken into consideration.⁵²

A special recreation permit may be required for certain activities in the national forests, such as group activities, recreation events, and motorized recreation vehicles. In establishing the fee the same conditions must be considered as were required for establishing the charge for the single-visit permits and recreation use fees.⁵³

Where a permit is required, several conditions must be satisfied. The use must comply with pertinent state and federal laws and regulations on public health, safety, air quality, and water quality. Also the use must not adversely impact archaeological, historic, or primitive values and must not conflict with existing resource management programs and objectives. The special recreation use must assure the necessary clean-up and restoration for any damages to resources or facilities, and it must be restricted to an area where it will have minimum impact on environmental, cultural, or natural resource values.⁵⁴

The Act provided authority to enforce the rules and regulations concerning collection of fees.⁵⁵ Any violation of those rules and regulations is punishable by a fine of not more than \$100.00.⁵⁶

The Department of Interior has established exceptions to, exclusions from, and exemptions for activities in which a fee will not be charged.⁵⁷ The Forest Service may not establish federal hunting or fishing licenses. It may not charge a fee to a private, non-commercial vehicle for use of a federally funded highway or road commonly used by the public as a means of travel between two places when either or both of them are outside the designated entrance fee area. The Forest Service cannot charge a fee for use of any road or highway to any land by a person who owns property within the designated fee area.

The Forest Service may not charge an entrance fee to any bona fide educational group using the designated fee area for educational or scientific purposes. Also, no federal recreation fee may be charged to a hospital inmate actively involved in medical treatment or therapy in the area visited.

Any person conducting state, federal government, or local business is exempt from payment of an entrance fee. In the Great Smoky Mountains National Park entrance fees may be collected only at the main highway and thoroughfare entrances. Persons under the age of 16 do not have to pay an entrance fee. Entrance fees will not be charged to persons having a right of access to lands and waters within a fee area for hunting or fishing privileges under a specific provision of law or treaty.⁵⁸

Each year, the Secretary of Agriculture must review all areas designated as user fee areas and determine whether additional areas meet the conditions to be designated as a fee area and whether fee areas should be increased, reduced, or eliminated according to the regional conditions.⁵⁹

In passing the Land and Water Conservation Fund Act of 1965 the congressional intent was to provide a fund to be used for providing more national recreation areas. Forest Service planning and management must be consistent with this intent; and in using monies from the fund to purchase land, the Forest Service must acquire land whose major value is for outdoor recreation purposes. Funds may also be used to construct and develop recreation facilities in the national forests. In establishing fees to charge for use of federal recreation areas and facilities, the Forest Service must conform to the guidelines established by the Department of Interior.

NOTES

¹Exec. Order No. 11,644, 37 Fed. Reg. 2877 (Feb. 9, 1972).

²Exec. Order No. 11,989, 42 Fed. Reg. 20006 (May 24, 1977).

³Exec. Order No. 11,644, § 1 (Feb. 8, 1972).

⁴43 C.F.R. §§ 295.1-295.6 (1978).

⁵Id. at § 295.2(b).

⁶Id. at § 295.2(b)(3).
⁷Id. at § 295.2(b)(1).
⁸Id. at § 295.2(b)(4).
⁹Id. at § 295.3.
¹⁰Id.
¹¹Id. at § 295.4.
¹²Id. at § 295.5. For a discussion of off-road vehicle impacts, see CEQ, Off-road Vehicles on Public Land (1979); 43 C.F.R. § 295.6 (1978).
¹³16 U.S.C. §§ 460ℓ-4 to 460ℓ-11 (1976). On Acquisitions generally, see Chapter I.A supra.
¹⁴S. Rep. No. 87-1364, 88th Cong., 2d Sess. reported in [1964] U.S. CODE CONG. & AD. NEWS 3634.
¹⁵16 U.S.C. § 460ℓ-9(a)(1) (1976); S. Rep. No. 87-1364, 88th Cong., 2d Sess. reprinted in [1964] U.S. CODE CONG. & AD. NEWS 3634.
¹⁶16 U.S.C. §§ 460ℓ-5(a)-(c) (1976).
¹⁷Id. at § 460ℓ-5(c)(1). The authorized annual amount is \$900 million through September 30, 1989. Id.
¹⁸Id. at § 460ℓ-5(c)(2).
¹⁹Id. at § 460ℓ-9.
²⁰Id. at § 460ℓ-6.
²¹Id. at § 460ℓ-7.
²²S. Rep. No. 88-1364, supra note 14, reported in [1964] U.S. CODE CONG. & AD. NEWS 3633, 3636.
²³16 U.S.C. § 460ℓ-9(a)(2).
²⁴Id. at § 460ℓ-9(a)(1).
²⁵Id.
²⁶Id.
²⁷Id.
²⁸Id. at § 460ℓ-9(a)(3).
²⁹Id.
³⁰Id. at § 460ℓ-9(b).
³¹United States v. 0.37 Acres of Land, 414 F. Supp. 470, 476 (D. Mont. 1976).
³²Id. at 476-77.
³³16 U.S.C. § 460ℓ-9(b) (1976).
³⁴36 C.F.R. § 291.9 (1978).
³⁵16 U.S.C. § 460ℓ-6a(d) (1976).
³⁶Exec. Order No. 11,200, § 5, 30 Fed. Reg. 2645 (1965).
³⁷43 C.F.R. §§ 18.1 et seq. (1976).
³⁸Id. at §§ 18.2(a)-(c).
³⁹Id. at §§ 18.3(a)(1)-(4).
⁴⁰Id. at §§ 18.3(b)(2)(i)-(iii).
⁴¹Id. at §§ 18.3(d)(1)(i)-(iv).
⁴²Id. at § 18.3(b)(3).
⁴³Id.
⁴⁴36 C.F.R. § 291.9(c) (1978).
⁴⁵43 C.F.R. § 18.4(a) (1978).

⁴⁶16 U.S.C. § 460ℓ-6a(a)(1) (1976); 43 C.F.R. § 18.5 (1978).
⁴⁷16 U.S.C. § 460ℓ-6a(a)(1) (1976); 43 C.F.R. § 18.6 (1978).
⁴⁸43 C.F.R. §§ 18.7(a)(1)-(6) (1978).
⁴⁹Id. at §§ 18.7(b)(1)-(2).
⁵⁰Id. at § 16.9(c).
⁵¹Id. at §§ 18.7(a)(1)-(6).
⁵²Id. at §§ 18.9(a)(1)-(6).
⁵³Id. at §§ 18.10(b)(1)-(6).
⁵⁴Id. at §§ 18.10(a)(1)-(4).
⁵⁵16 U.S.C. § 460ℓ-6a(e) (1976).
⁵⁶43 C.F.R. & 18.12 (1978); 36 C.F.R. § 261.15 (1978).
⁵⁷43 C.F.R. § 18.13 (1978).
⁵⁸Id. at §§ 18.13(a)-(i).
⁵⁹Exec. Order No. 11,200, § 2(b), 30 Fed. Reg. 2645 (1965).

7. Wilderness*

(a) Wilderness Act of 1964

The Wilderness Act reflects congressional concern over the adverse impact of society on land areas that basically remain in their natural state. Population growth has caused an increase in demand for natural resources and recreational activities in previously unused areas. In addition, modern technology can rapidly destroy the positive characteristics of areas in their natural state. Realizing that natural areas were threatened by this increased demand for their resources and the technology capable of remaking them, Congress adopted a statutory system for classification of these lands to preserve them. Specifically, the Wilderness Act of 1964¹ protects wilderness areas from premature and intense development in order to preserve their natural condition for the use and enjoyment of present and future generations.

The Wilderness Act has a two-pronged aspect. The first is the planning aspect, which imposes study and classification responsibilities on federal agencies concerning lands within their jurisdictions. The second is the management aspect, which imposes limitations on uses and purposes for which wilderness areas may be managed and administered. Each of these aspects in turn affects the Forest Service.

Under the Wilderness Act the planning responsibilities fall on the Secretary of Agriculture (delegated by the Secretary to the Forest Service) for review and study of NFS lands that might be suitable for inclusion in the National

* The notes for subsection 7 begin on p. 74.

Wilderness Preservation System (NWPS).² The 1964 Act specifically designated all areas which previously had been wild, canoe, or wilderness as wilderness areas and designated those as the initial components of the system.³ Then, during the next ten years, the Secretary of Agriculture was required to study all areas in the national forests previously classified as primitive areas for their suitability and possible inclusion in the NWPS. Specific times were set to conclude these studies over stated quantities of these areas and to make the report of the findings and recommendations to the President for advice and recommendation to Congress concerning reclassification of those primitive areas.⁴ In addition the Act authorizes recommendations to Congress concerning altering boundaries of existing primitive areas or recommending addition of contiguous areas of national forest lands that would be otherwise suitable for wilderness purposes.⁵

The Secretary is to be guided by the Act in making his recommendations and study for inclusion in the NWPS. The Act defines wilderness

as an area where the earth and its community of life are untrampled by man, where man himself is a visitor who does not remain. . . . [It is] an area of undeveloped Federal land retaining its primordial character and influence, without permanent improvements or human habitation, which is protected and managed so as to preserve natural conditions and which (1) generally appears to have been affected primarily by the forces of nature with the imprint of man's work substantially unnoticeable; (2) has outstanding opportunities for solitude or a primitive and unconfined type of recreation; (3) has at least 5,000 acres of land or is of sufficient size as to make practicable its preservation and use in an unimpaired condition; and (4) may also contain technological, geological, or other features of scientific, educational, scenic, or historical value.⁶

In light of this definition it seems clear the Forest Service management must focus on long-range planning and preservation of the wilderness areas.

In conducting its review of primitive areas for study as possible inclusion in the NWPS, the Forest Service has specific procedural requirements imposed on it. The Forest Service must conduct public hearings after having provided public notice of the proposed action concerning the affected area. Public hearings must be held in a convenient location in the affected area. When more than one state is involved, at least one hearing in each state must be held. The notice must be given thirty days in advance of the hearing, and the record of the hearing must be included in the findings that are submitted to the President and Congress.

In carrying out its planning activities, the Forest Service is limited to its use of study areas. Prior to the Act the Forest Service had the authority to determine what areas would be wilderness.⁷ After the Wilderness Act that ultimate determination rested with Congress.⁸ Parker v. United States⁹ raised the issue of whether the planning requirements under the Wilderness Act are mandatory or discretionary with the Forest Service. In Parker the Forest Service had granted a timber contract which would authorize a haul road for an area that was contiguous to a primitive area under study for inclusion in the NWPS. The Forest Service maintained that it had conducted a multiple-use sustained-yield study which had determined the area was inappropriate for wilderness. The plaintiffs contended that the area was contiguous to a primitive area requiring study under the Wilderness Act for possible inclusion in the NWPS. The plaintiffs maintained that the statutory requirements had been met, i.e., that the area was suitable for inclusion in the system. The plaintiffs contended at that juncture that the Forest Service had no choice but to manage the area in a manner that would be compatible with a possible recommendation for reclassification as a wilderness area.

The Parker court concluded that the Forest Service could not enter into the contract until a recommendation required under the Act had been made and Congress had acted on whether the area should be included. The court concluded that the Wilderness Act requirement that the Forest Service study the area was mandatory. Once it concluded that the area was suitable for wilderness by satisfying the statutory definition, the Forest Service had to report its findings to the President. The Secretary and President then would send their recommendations to Congress concerning ultimate use of the area. Pending that action, the Forest Service had to limit the use of the area so that it would be compatible with its possible future reclassification as a wilderness area. The court held that the timbering contract could not be allowed because that activity was incompatible with use of the area as wilderness.

Thus, the Forest Service has the responsibility under the Act to review areas for possible inclusion in the NWPS, and once a suitability determination has been made, the Forest Service must include its findings in a report to the Secretary and President. Pending ultimate disposition of those findings by the President and Congress, the Forest Service cannot take any action concerning a study area that might be inconsistent with its potential use as a wilderness area.¹⁰

The latter requirement evidences the overlap between the planning and management limitations on Forest Service activities under the Wilderness

Act. The planning responsibility basically is one to review particular areas and has been expanded subsequent to the 1964 Act to include study of other areas. The management options available to the Forest Service are greatly restricted in wilderness areas.

Interestingly, the purposes of the Wilderness Act are declared expressly to be supplemental to the requirements of the 1897 Act and the Multiple-Use Sustained-Yield Act of 1960.¹² Under the Wilderness Act wilderness areas remain under the jurisdiction of the agency previously administering the area.¹³ That agency is "responsible for preserving the wilderness character of the area and shall so administer such area for such other purposes for which it may have been established as also to preserve its wilderness character."¹⁴ The express purposes for which wilderness may be managed are recreational, scenic, scientific, educational, conservation, and historical uses.¹⁵

The Wilderness Act expressly states that its purposes are within and supplemental to the purposes for which national forests are established and administered. It further provides that its provisions are not intended to interfere with the purposes for which forests were established under the 1897 Act and the Multiple-Use Sustained-Yield Act. In one sense those provisions seem inconsistent with the Act's definition of wilderness areas and the public purposes for which they may be created. The intensive management and development which might be authorized under the 1897 Act and MUSY could appear incompatible with the preservation requirement for the wilderness areas. In another sense, however, they may be viewed as being supplemental to, and totally compatible with, the basic conservation objectives of national forest management. Specific management provisions in the Act clarify this point.

In managing wilderness areas the Act prohibits uses that are inherently incompatible with wilderness. Specifically the Act prohibits commercial enterprises and permanent roads. Temporary roads, the use of motor vehicles, motorized equipment, motor boats, aircraft, or other forms of mechanical transport, and any structure or installation also are prohibited, unless they are necessary on an emergency basis involving a person's health or safety.¹⁶ In practice the Forest Service has been even broader in its definition of the prohibited "mechanical transport."¹⁷ However, the Act does allow established uses of aircrafts or motorboats to be continued subject to any restrictions the Secretary may impose. In addition, prospecting and some mining activity are authorized as long as they are done in a manner compatible with the preservation of the wilderness environment.

The Act does not attempt to condemn or take any property rights. In fact, throughout the Act all restrictions and limitations are subject to existing private rights. Moreover, in some specific instances established uses are allowed to continue. The general criteria to evaluate whether

a use can be permitted is its compatibility with wilderness purposes. If the proposed activity is basically incompatible, it should be disallowed.

The Forest Service is given discretion, however, in managing wilderness areas within the expressed limits and guidelines designated by the statute. For example, even where established uses of aircrafts and boats are allowed, the Secretary may determine restrictions on those uses.¹⁸ Likewise, the Secretary is given the authority to take any action necessary in the wilderness areas to control fire, insects, and diseases.¹⁹ Similarly, the Secretary is authorized to take whatever measures are necessary for the health and safety of persons within the area in an emergency.²⁰ Commercial services are authorized to the extent that they are necessary for the recreational and other wilderness purposes of the area. These activities include backpacking, outfitters, packers, and guides.²¹

Resource development presents a special problem in wilderness areas. Resource development is authorized pursuant to the multiple-use sustained-yield management principle if not compatible with the wilderness nature of the area. Mining is specifically authorized so long as it does not endanger the wilderness environment.²² Managing in a manner that will authorize preservation of the wilderness area and its restoration may be consistent with the Act in certain instances. Prospecting for minerals and leasing in wilderness areas is authorized through 1983.²³

Logging presents other considerations. Commercial timbering may be incompatible with wilderness areas. Although *MPiRG v. Butz*²⁴ allowed commercial logging in the Boundary Waters Canoe Area, that decision may be limited to its facts and the area involved, which was specifically addressed in the 1964 Act.²⁵ Some other cases also have involved the Boundary Waters Canoe Area in Minnesota which is subject to special provisions under the 1964 Act.²⁶ Historically this area has not been treated as a pure wilderness area and did have commercial activities, including mining and logging, in it. Under the Act those pre-existing uses receive special protection. Hence, decisions interpreting those uses and allowing them to continue there may well be confined to that region. Other cases have not been as willing to allow logging, for example, in wilderness areas generally since logging is an incompatible use. Commercial timbering is an incompatible use because it usually destroys the wilderness characteristics of the area.²⁷

Under the Act the President is authorized to undertake activities in wilderness areas in NFS lands if the public interest is better served by the area's use than by its nonuse.²⁸ The permitted activities include identifying regions suitable for water resource development, reservoirs, water conservation work, and power projects. The last may also necessitate transmission lines and other facilities such as roads for the

development and use of the power. These activities are allowed only if the public interest is better served by development than by use as a wilderness area.

Certain pre-existing uses are allowed to continue under the Act, reflecting in part, perhaps, the congressional intent not to take vested rights of individuals. Hence, if at the effective date of the Act areas were committed to using motor boats or aircrafts, those uses were allowed to continue.²⁹ However, some uses which previously were irrevocable and strictly permissive situations, such as grazing, remain subject to regulation by the Secretary of Agriculture.³⁰ Pre-existing uses were protected in a logging situation involving the Boundary Waters Canoe Area in Minnesota where virgin forest was allowed to be cut because it had previously been timbered.³¹

The Forest Service also has to allow access in wilderness areas for individuals who own other property surrounded by or adjacent to the areas.³² The Forest Service is entitled to determine what constitutes reasonable access and where the route will be located, but must provide ingress and egress.³³ Similarly, the Forest Service must allow access for mineral prospecting.³⁴

The Forest Service has the basic authority to handle the daily, routine affairs of administering wilderness areas on NFS lands. This authority may include granting permits for camping, canoeing, grazing, information gathering, logging, or access to the lands. This permission is subject to whatever limitations and restrictions the Forest Service considers appropriate to impose.³⁵ The Forest Service also controls the use of aircraft in wilderness areas.³⁶

Thus, wilderness areas require special management considerations. Preservation of the area is the principal factor, and any use allowed must be compatible with the wilderness nature of the area. Other uses may only be undertaken in a manner that assures it will be compatible with the wilderness objectives. Those uses must be on stated conditions that will preserve and protect the wilderness area.

(b) Wild and Scenic Rivers Act

The congressional policy for the preservation and protection of free-flowing rivers basically in their natural state is set forth in the Wild and Scenic Rivers Act.³⁷ The means Congress adopted to implement that policy of protecting rivers and their immediately adjacent land from development was similar to the method adopted in the Wilderness Act. Like the Wilderness Act, the Wild and Scenic Rivers Act imposed planning, as well as management obligations on federal agencies.

The purposes of the Act are implemented through the establishment of the Wild and Scenic Rivers System. To be designated a river within

the System, a river must satisfy the statutory definition. The definition itself imposes indirect limitations on the use of the rivers. The definition requires that the river must be free-flowing and in its basic natural condition with no major development and minimal modifications. After a river is included within the System it is subject to protection from development by requiring management that controls its use. In this manner the Act imposes both planning and management responsibilities on federal agencies.

The planning responsibilities ensure principally from considering rivers as possible candidates for inclusion within the System. In stated instances the Forest Service is required to study and report its findings concerning particular rivers to Congress.³⁹ During the time of the study the Forest Service is to manage the river in a manner that would be consistent with ultimately including the river in the System. Similarly, rivers that Congress initially placed within the System must be controlled in a manner consistent with the purposes of the Act if those rivers are on national forest or other Forest Service managed land.⁴⁰ Rivers are included within the System in two ways. The first is upon specific designation by legislative act of Congress; the second means is through state initiative. If a state legislature designates a river as a wild and scenic river, or if the Governor applies for its inclusion within the System and the Secretary of Interior approves that application, the river becomes part of the national System.

The Act defines eligible river areas as these "free-flowing stream and the related adjacent land area that possesses one or more of the values" of the policy section of the Act.⁴¹ The values identified there include "outstandingly remarkable scenic, recreational, geologic, fish and wildlife, historic, cultural, or other similar values."⁴² Rivers in the System are to be classified as wild, scenic, or recreational rivers according to their natural or restored conditions. "Wild river areas" are "[t]hose rivers or sections of rivers that are free of impoundments and generally inaccessible except by trail, with watersheds or shorelines essentially primitive and water unpolluted."⁴³ "Scenic river areas" are "[t]hose rivers or sections of rivers that are free of impoundments, with shorelines or watersheds still largely primitive and shorelines largely undeveloped, but accessible in places by road."⁴⁴ "Recreational river areas," the third category, are "[t]hose rivers or sections of rivers that are readily accessible by road or railroad, that may have some development along their shorelines, and they may have undergone some impoundment or diversion in the past."⁴⁵ Each river is to be administered according to its classification within the System.

The planning obligations of the Secretary of Agriculture with respect to NFS lands basically falls upon the Forest Service. That responsi-

bility entails studying designated rivers and reporting to the President concerning the suitability or non-suitability of the river for addition to the System. Rivers to be studied are those that were designated in the original Act or named subsequently by Congress as potential additions to the System. The study and report to Congress of recommendations from the President were to be concluded by October 2, 1978. Priority must be given to those rivers which would be most threatened by development which, if undertaken, would render the river unsuitable for inclusion in the System. The study and plans being conducted must be coordinated with water resource planning on the same river that is being done pursuant to the Water Resources Planning Act.

The Act is very specific concerning what should be included in the report to Congress.

Each report, including maps and illustrations, shall show among other things the area included within the report; the characteristics which do or do not make the area a worthy addition to the system; the current status of land ownership and use in the area; the reasonably foreseeable potential uses of the land and water which would be enhanced, foreclosed, or curtailed if the area were included in the national wild and scenic rivers system. . . .⁴⁸

In addition the report must indicate the federal agency that would administer the river after its inclusion in the System, the cost-sharing, if any, that would be undertaken with state and local agencies, and the cost of acquiring land and interests in land for administering the area if it were added to the System. Each report will be published as a House or Senate document.⁴⁹

The Secretary of Agriculture also may comply with certain procedures in preparation of the report. The proposed report must be circulated to the Secretary of Interior, the Secretary of Army, and the Chairman of the Federal Power Commission as well as the head of any other affected federal department or agency. Any report or comments furnished by those individuals to the Secretary of Agriculture within 90 days of submission to them shall be included within the report to the President and Congress. In addition, the earliest time that any river could be considered for inclusion would be the first session of Congress following a meeting of the state legislature in the state in which the proposed river is located.⁵⁰

Under the circulation provision, the Secretary of Agriculture also is one of the designated agencies to receive a proposed report from the Secretary of Interior with respect to lands managed by the Department of Interior. The Secretary may make comments or recommendations to the Department of Interior as appropriate.⁵¹ The Act also requires that every agency that is involved with development of water or related land resources must

give consideration to potential national scenic, recreational, and wild river areas. All river basins and water project plan reports that are submitted to Congress must consider and discuss those potentials.⁵² Under the Act the Secretaries of Interior and Agriculture are required to make specific studies and investigations to ascertain which areas should be included in planning reports by all federal agencies as potential alternative uses for water and water-related land resource projects.⁵³

Under the Act the Secretary of Agriculture has the condemnation authority to acquire lands and the interest in lands immediately adjacent to rivers within the System. That power is limited to a maximum of fee title in an average of 100 acres per mile on both sides of the river.⁵⁴ State-owned lands may not be condemned, but may be accepted by donation.⁵⁵ Lands owned by Indian tribes or political subdivisions of a state may not be obtained without the consent of the governing body of the tribe or subdivision if the latter is following a management plan for managing and protecting the land to fulfill the purposes of the Act.⁵⁶

The condemnation power is limited if the United States owns 50% of the land within a wild, scenic, or recreational river area or if a state or political subdivision of a state owns the land.⁵⁷ Likewise condemnation may not be used if the lands are located within political subdivisions which have enacted zoning ordinances that are compatible with the purposes of this Act.⁵⁸ The Secretary is authorized to issue guidelines or standards for local ordinances that would be compatible with this Act. Those standards "specified in such guidelines shall have the object of (A) prohibiting new commercial or industrial uses other than commercial or industrial uses which are consistent with the purposes of this chapter, and (B) the protection of the bank lands by means of acreage, frontage, and setback requirements on development."⁵⁹ The condemnation powers are not limited, however, if they are necessary to clear title or to acquire scenic or other easements which would assure public access to the river or for purposes of traversing the river area.⁶⁰

The Secretary also is authorized to exchange federally-owned lands for title to privately-owned lands that are within the designated river area.⁶¹ The exchange may be done if the federally-owned property is within the same state that the river is located and if the land has been classified as suitable for exchange or disposition. The values of the property must be approximately equal or the difference paid for in monetary payment. Similarly, lands may be transferred between federal agencies. Federally-owned lands adjacent to or within a national forest that is transferred from another agency shall be administered by the Secretary as NFS lands.⁶² And the Secretary is authorized to accept donations of land needed for the purposes of the Act.⁶³

If the land obtained by the Secretary has a single family dwelling on it, the owner may retain an interest in the property. That interest may be a right to use and occupy the property for non-commercial residential purposes for a definite term not to exceed 25 years or for a term of the life of the owner or spouse or both. Any retained interest may be terminated by the Secretary if it is used in a manner that is inconsistent with the purposes of the Act.⁶⁴

Under the Act several types of uses are limited and restricted. The Act prohibits the Federal Power Commission from licensing any hydro-electric power project on a river within the System.⁶⁵ Any request for authorization or appropriation must be accompanied by notification to the Secretary and the Congress to the effect that the project will adversely affect a river within the System.⁶⁶ Similarly, river areas subject to study under the Act are also protected in the same manner during the period for the study. Other agencies must inform the Secretaries of any activities that are incompatible with the river system subject to study.⁶⁷ Likewise the public lands immediately adjacent to the river systems and those subject to being studied are withdrawn for entry under the public land laws.⁶⁸

Mining uses also are regulated. Under the Act any mining claim that is not perfected prior to inclusion within the System or completion of a study for inclusion within the System are subject to regulations promulgated by the Secretary of Agriculture with respect to NFS lands.⁶⁹ Those regulations must carry out the purposes of the Act. Similarly, except for existing rights, the perfection of any mining claims affecting lands within the System shall be valid only with respect to the mineral deposits and the use of the surface resources reasonably necessary to carry on the operation.⁷⁰ They also must be consistent with regulations prescribed by the Secretary of Agriculture. Thus, the Secretary of Agriculture, with respect to NFS lands, may prescribe regulations controlling the mining claims conducted on the river system and its land areas.⁷¹

The Act also withdraws from mineral development the parts of the system containing the bed or bank of the river and one quarter mile from the bank for any appropriation under mining laws or mineral leasing laws. The only exceptions to any of these are valid existing rights. The regulations that shall be issued must protect against pollution of the river and unnecessary impairment of scenery within the river area.⁷² The same provisions apply in a similar fashion with respect to the river systems required to be studied for the period of the study under the Act.

The management of the river system turns in part on its classification. Every component of the system is to be administered to protect and enhance the values for which it was included within the system and to limit other uses "that do not substantially interfere with public use and enjoy-

ment of these values."⁷³ Under the Act "primary emphasis shall be given to protecting its aesthetic scenic, historic, archaeological, and scientific features."⁷⁴ If a river system is within a wilderness area and both the Wilderness Act and Wild and Scenic Rivers Act apply, the more restrictive provisions will apply concerning its management.⁷⁵ The Secretary of Agriculture is expressly authorized to use the statutory authorities for the management of national forests to carry out the purposes of the Wild and Scenic Rivers Act.⁷⁶

The Act also requires the Secretary of Agriculture to review all of the authority applicable to rivers subject to study under the Act. Specifically, policies, regulations, contracts, and plans within jurisdictions must be examined to ascertain what actions should be taken to protect the rivers while they are being studied. "Particular attention shall be given to scheduled timber harvesting, road construction, and similar activities which might be contrary to the purposes of this chapter."⁷⁷ The provision, however, is not intended to affect any existing rights, and any action taken that would affect existing rights must be done with the consent of the party affected.⁷⁸

NOTES

¹16 U.S.C. §§ 1131-36 (1976).

²*Id.* at § 1131(a).

³*Id.* at § 1132(a).

⁴*Id.* at § 1132(b).

⁵*Id.* at § 1132(e).

⁶*Id.* at § 1131(c).

⁷Multiple-Use Sustained-Yield Act of 1960, 16 U.S.C. § 529 (1976).

⁸16 U.S.C. § 1131(a) (1976).

⁹309 F. Supp. 593 (D.C. Colo. 1970), *aff'd*, 448 F.2d 793 (10th Cir. 1971), *cert. denied*, 405 U.S. 989 (1972).

¹⁰*Id.*

¹¹*See* Pub. L. No. 95-450 (Rocky Mountain National Park); Montana Wilderness Study Act of 1977, Pub. L. No. 95-150; Alpine Lakes Area Management Act of 1976, Pub. L. No. 94-357; and Eastern Wilderness Area, Pub. L. No. 93-622.

¹²16 U.S.C. § 1133(a)(1) (1976).

¹³*Id.* at § 1131(b).

¹⁴*Id.* at § 1133(b).

¹⁵*Id.*

¹⁶*Id.* at § 1133(c).

¹⁷36 C.F.R. § 293.6(a) (1977).

¹⁸16 U.S.C. § 1133(d)(1) (1976).

¹⁹*Id.*

²⁰*Id.* at § 1133(c).

²¹*Id.* at § 1133(d)(6). *See* 36 C.F.R. § 293.8 (1977).

²²16 U.S.C. § 1133(d)(3) (1976).

²³*Id.*

²⁴541 F.2d 1292 (8th Cir. 1976).

²⁵Their limitation may be attributed to the fact that logging has been an established practice in the BWCA, prior to BWCA's wilderness classification. *Id.* See also 16 U.S.C. § 1133(d)(5) (1976).

²⁶16 U.S.C. § 1133(d)(5) (1976). Section 1133(d)(5) was deleted by Pub. L. No. 95-495 which established the Boundary Waters Canoe Area Wilderness on October 2, 1978.

²⁷*E.g.*, *Parker v. United States*, 309 F. Supp. 593 (D.C. Colo. 1970), *aff'd*, 448 F.2d 793 (10th Cir. 1971), *cert. denied*, 405 U.S. 989 (1972).

²⁸16 U.S.C. § 1133(d)(4) (1976).

²⁹*Id.* at § 1133(d)(1).

³⁰*Id.* at § 1133(d)(4).

³¹*Minnesota Public Interest Research Group v. Buttz*, 541 F.2d 1292 (8th Cir. 1976). Subsequently the BWCA was designated a wilderness area by Congress. See note 26, *supra*.

³²16 U.S.C. § 1134(a) (1976).

³³*Id.* at § 1134(b).

³⁴*Id.* at § 1133(d)(3).

³⁵*Id.* at § 1133; see also *Parker v. United States*, 448 F.2d 793 (10th Cir. 1971); 36 C.F.R. §§ 293.3 § .15(b) (1977).

³⁶16 U.S.C. § 1133(d)(1) (1976).

³⁷*Id.* at §§ 1271-87.

³⁸*Id.* at § 1273(b).

³⁹*Id.* at § 1275.

⁴⁰*Id.* at § 1281.

⁴¹*Id.* at § 1273(b).

⁴²*Id.* at § 1271.

⁴³*Id.* at § 1273(a)(1).

⁴⁴*Id.* at § 1273(a)(2).

⁴⁵*Id.* at § 1273(d)(3).

⁴⁶*Id.* at § 1275.

⁴⁷*Id.*

⁴⁸*Id.* at § 1275(a).

⁴⁹*Id.*

⁵⁰*Id.* at § 1275(b).

⁵¹*Id.*

⁵²*Id.* at § 1278(a).

⁵³*Id.* at § 1278(b).

⁵⁴*Id.* at § 1277(a).

⁵⁵*Id.*

⁵⁶*Id.*

⁵⁷*Id.* at § 1277(b).

⁵⁸*Id.* at § 1277(c).

⁵⁹*Id.*

⁶⁰*Id.* at § 1277(b).

⁶¹*Id.* at § 1277(d).

⁶²*Id.* at § 1277(e).

⁶³*Id.* at § 1277(f).

⁶⁴*Id.* at § 1277(g).

⁶⁵*Id.* at § 1278(a).

⁶⁶*Id.*

⁶⁷*Id.* at § 1278(b).

⁶⁸*Id.* at § 1279.

⁶⁹*Id.* at § 1280(a).

⁷⁰*Id.*

⁷¹*Id.*

⁷²*Id.*

⁷³*Id.* at § 1281(a).

⁷⁴*Id.*

⁷⁵*Id.* at § 1281(b).

⁷⁶*Id.* at § 1281(d).

⁷⁷*Id.* at § 1283(a).

⁷⁸*Id.* at § 1283(b).

8. Air*

In 1970 Congress drastically changed the federal involvement in the air pollution field, with the enactment of the Clean Air Act Amendments of 1970 (hereinafter 1970 Amendments).¹ In 1977 several mid-course corrections were accomplished through the Clean Air Amendments of 1977 (hereinafter 1977 Amendments).² In instances major policy decisions of the Environmental Protection Agency (EPA) were either changed or ratified by Congress. Several aspects of both the 1970 and 1977 Amendments have a clear impact upon the Forest Service.

There are four major programs which have potential ramifications on the land management planning process of the Forest Service. In order of decreasing impact these programs are: the principle of the prevention of significant deterioration of pristine air, the requirement that federal facilities obtain state permits for their activities which emit air pollutants, the program governing development of new or modified sources of air pollution in nonattainment areas, and the control and permitting of indirect sources of pollution. All four programs directly and indirectly impact the Forest Service land management planning process.

(a) Prevention of Significant Deterioration

The most important air pollution-related program that has an impact on the land management planning practices of the Forest Service is the principle or doctrine of the prevention of

* The notes for subsection 8 begin on p. 89.

significant deterioration (PSD) of pristine air. The principle of PSD is not explicitly found anywhere in the 1970 Amendments.³ The 1977 Amendments, however, make clear that Congress intended to and still desires to implement a PSD policy.⁴ Since Congress's action on PSD reflects the earlier debates, the background of the PSD issue is important in understanding the present PSD strategy. PSD arises in areas of so-called pristine air, i.e., those areas where the air quality was below the national ambient air quality standards.⁵ The problem was a real one because at least 50%, and some estimated as high as 80%, of the nation's land was so situated.⁶ Most of the land administered by the Forest Service is clearly under the PSD program.

In 1970 the Administrator of the EPA was faced with the enormous task of promulgating regulations implementing a complex and imprecise congressional statute which dealt with a multitude of problems and solutions. As developed, the basic regulatory scheme for controlling stationary sources of air pollution involved initial state responsibility to develop state implementation plans (SIPs) which had to be designed to achieve the national primary ambient air quality standards by 1975.⁷ The Administrator had a major review and veto role with the responsibility to promulgate substitute SIPs where the state submissions were inadequate.⁸ In order to assist the states in developing SIPs that would meet the statutory criteria, the Administrator promulgated a series of regulations that set out what the SIP must contain. After several internal conflicts over PSD, the Administrator proposed a regulation which merely required the states to do no more than "prevent . . . ambient pollution levels from exceeding . . . secondary standard(s)."⁹ The Sierra Club and other environmental organizations brought a civil action under section 304 of the 1970 Amendments claiming that the Administrator had breached a mandatory duty to prevent significant deterioration.

In the now-famous case of Sierra Club v. Ruckelshaus¹⁰ the U.S. District Court for the District of Columbia ruled that there was a duty on the Administrator to prevent significant deterioration. Its decision was based on the legislative history of the 1970 Amendments and the broad mandate contained within the statute to "protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population."¹¹ The district court then issued a preliminary injunction preventing the Administrator from approving any SIPs that permitted the significant deterioration of existing air quality.¹²

Faced with this imprecise judicial mandate and an almost imperceptible congressional mandate, the Administrator had to develop a set of regulations dealing with the PSD problem. The Administrator in proposing four possible alternative approaches to the problem in 1973 stated in the preamble to the proposed rulemaking that his decision would have wide-ranging social and economic

ramifications.¹³ The Administrator could not consider health as a factor because the primary standards were designed to protect the public from any potential health hazard. The issue was seen as one of balancing economic growth with aesthetic, scenic, and recreational values. This internal decisionmaking process of balancing economic versus noneconomic factors was attacked by several interest groups which sought to exclude economic factors from the decisionmaking process. But the Administrator persisted in applying this balancing approach throughout the rulemaking process. Full public debate was required because this approach was in essence a non-technical public policy issue. This was the reason for the rather unusual effort to propose alternative approaches to resolving the problem.

None of the proposals in the first effort, however, attempted to deal with the issue of the role of the federal land manager or federal lands in the PSD process. In fact one of the plans, the Air Quality Increment Plan, would have allowed the deterioration of air quality to be the same for the entire Air Quality Control Region (AQCR) whether the region was in a developed area or in a national park or forest.¹⁶ Of the four plans the one which the EPA seemed to favor was the Area Classification Plan which proposed to divide the clean air areas into two classes or zones which would allow different amounts of deterioration.¹⁷ Class I would allow minimum degradation, and the Administrator specifically mentioned national parks and forests as being eligible for classification for minimal degradation.¹⁸ Class II lands would allow further degradation but at levels still below the secondary ambient air quality standards. All of the land that had pristine air would have been initially classified in Class II. The proposed regulations provided that a state would initiate any reclassification to Class I. Public hearings were required, but there was no mention of federal land managers and their role in the decisionmaking process. At this time the regulations only provided for the preconstruction review of stationary sources which emitted more than 4,000 tons per year of particulate matter or sulfur dioxide or were on a list of 16 different industrial processes.¹⁹

The other three plans dealt with four of the six pollutants for which there were national ambient air quality standards. Thus by only dealing with particulates and sulfur dioxide, the Area Classification Plan was more limited. This pattern, however, was to be later adopted by both the EPA and Congress. In addition to the redesignation to Class I, states after a public hearing also could petition the Administrator for an exception for a particular region where the air quality could be degraded to the secondary standard.²⁰ They could do so only after proving the existence of unique circumstances and submitting evidence that they had reviewed the entire state for reclassification to Class I for areas of recreational, historical, or scenic beauty.

After receiving numerous public comments and holding a series of public hearings the Administrator again decided to postpone final promulgation of the PSD rule and instead chose to propose a modified version of the Area Classification Plan.²¹ This decision was made some 13 months after the original rules had been proposed. The new proposal called for the addition of a Class III region where deterioration would be allowed up to the secondary standards.²² Again, preconstruction review was required only for major emitters of particulate matter or sulfur dioxide. However, three more categories of industrial facilities were added to the original list of 16 that had to go through the state permit review process prior to construction.

The proposal again called for the initial designation of all areas as Class II.²³ The new plan, however, contained for the first time the term "Federal Land Manager" (FLM).²⁴ That term was defined to be the "head, or his designated representative, of any Department or Agency of the Federal Government which administers federally-owned land, including public domain lands." Unfortunately, the plan did not state why FLMs were suddenly included in the classification procedure.

States were given the primary responsibility for redesignating all areas from the initial congressional Class II designation. Where lands owned by the federal government were involved, the initial proposal called for the state to submit its redesignation plan, after a public hearing, to the FLM who must be in agreement with the designation prior to its submission to the Administrator.²⁵ This, in effect, gave the FLM a veto power over state-initiated redesignation requests. The FLM also was given the authority to initiate the redesignation process by submitting an application to the state. If a dispute arose between the FLM and the state over a redesignation, the problem would be resolved by the Executive Office of the President, which would become the designating body.²⁷ For lands that were defined to be of "exclusive federal legislative jurisdiction" only the FLM was responsible for redesignation of the lands, although the FLM had to consult with the state prior to submitting the request to the Administrator and hold a public hearing in the affected area.²⁸

After receiving more public comments, which largely dealt with the addition of a Class III area, the Administrator promulgated rules implementing the PSD principle in December 1974.²⁹ At that time the Administrator noted that the problem of PSD for hydrocarbons, photochemical oxidants, carbon monoxide, and nitrogen oxides was left unresolved. He conceded that if new techniques could be developed for measuring the potential effects on pristine air of these automotive-based emissions, then a new source review for indirect sources or large scale developments might have to be added to the PSD regulations.³⁰

The Administrator retained the initial designation of all areas as Class II but made some major changes in the reclassification procedure. Public comments were critical of the veto power held by FLMs over state decisions to reclassify. This was especially important because reclassification to Class I for federal lands would not only affect development on federal lands, but also have a wide-ranging impact on private lands in the vicinity of the Class I federal lands because of the long-range transportation of pollutants through the ambient air.³¹ The use of a minimum 50-mile buffer zone around Class I areas had been suggested as one way to protect Class I areas.

States could reclassify land from Class II only after holding a public hearing where a record was developed that considered not only the anticipated growth of the area, but also the social, environmental, and economic effects of the redesignation and any regional or national impacts that were involved.³² FLM approval was no longer required, although consultation with the manager was mandated.³³ FLMs, however, could submit to the Administrator a proposal to redesignate federal land to a more restrictive classification than would otherwise be applicable, if they consulted with the state and followed the same procedures that governed the state redesignation scheme.³⁴ This procedure eliminated the veto power of the FLM but retained his authority to redesignate federal lands.

What was left unresolved was the potential for conflicting requests for reclassification. These might occur if the state sought to reclassify to Class III an area adjacent to a national forest where the land manager might recommend a redesignation to Class I. Even the amount of development allowed in Class II areas, if near enough to a Class I area, would still be such so as to violate the Class I PSD increments.

The maximum amount of degradation allowed in a Class I area was 5 micrograms/cubic meter annual geometric mean and 10 micrograms/cubic meter, 24-hour maximum for particulate matter and 2 micrograms/cubic meter annual arithmetic mean, 5 micrograms/cubic meter, 24-hour maximum and 25 micrograms/cubic meter 3-hour maximum for sulfur dioxide.³⁵ For Class II areas the maximum amount of degradation allowed was 10 micrograms/cubic meter annual geometric mean and 30 micrograms/cubic meter 24-hour maximum for particulate matter and 15 micrograms/cubic meter annual arithmetic mean, 100 micrograms/cubic meter 24-hour maximum and 700 micrograms/cubic meter 3-hour maximum for sulfur dioxide.³⁶ Class III areas could allow degradation up to the national secondary ambient air quality standards.³⁷

The role of the Administrator in reviewing the redesignation decisions was limited to seeing that the procedures had been followed and that

the state had not arbitrarily or capriciously disregarded relevant considerations set forth in the regulations. A similarly limited review decision applied to FLM-initiated redesignation petitions. The Administrator must solicit written comments from affected federal agencies and Indian governing bodies which may be affected by any redesignation. If a proposed redesignation had interstate effects or had impacts on an Indian Reservation, the Administrator can approve the redesignation only if he determines that the redesignation balances considerations of growth in both the area being redesignated and upon the impacted areas as well.³⁸

After final promulgation the PSD rules were subject to judicial scrutiny. In a law suit in which both environmental groups and industry were joined, the District of Columbia Court of Appeals upheld the validity of the challenged regulations.³⁹ The court specifically deferred to the EPA's expertise in its decision to omit from the PSD regulations four of the six pollutants for which ambient air quality standards had been set.⁴⁰ The court also dealt with the issue of whether the Clean Air Act authorized the EPA to delegate to FLMs the authority to propose redesignation of their lands after consultation with state and local officials.⁴¹ While noting the extraterritorial effect of redesignating large areas as Class I, the court agreed with the EPA that air quality over federal land was of some import to FLMs. It refused, however, to resolve the issue; it deemed it not ripe for review because no federal Indian lands had yet been redesignated.⁴²

Subsequent to the decision in Sierra Club, the Northern Cheyenne Indian Reservation in southeast Montana became the first, and, to date, only site to be redesignated as a Class I PSD area.⁴³ The result has ramifications for the nearby Colstrip coal-burning electrical generating plant which will probably have to increase flue gas desulfurization control efficiency from 75% to 85-90% to avoid violating the sulfur dioxide maximum increment for the reservation's new Class I designation.⁴⁴ In that particular case the Governor of Wyoming opposed the redesignation but provided no supporting documentation to bolster his negative reaction.

The Supreme Court in granting its writ of certiorari in the Sierra Club case limited its review to two basic questions: (1) whether regulations promulgated by the EPA to prevent significant deterioration of air quality are authorized by the Clean Air Act, and (2) whether the Clean Air Act permits EPA to adopt regulations which grant to FLMs and Indian governing bodies the power to reclassify federal and Indian lands within their jurisdiction.⁴⁵ The enactment of the 1977 Amendments appears to have eliminated the first issue that the Supreme Court granted review on. In addition, the second issue is no longer relevant because the 1977 Amendments strip away the power of the FLM to redesignate federal lands. The Supreme Court subsequently vacated its grant of

certiorari and remanded the case to the Court of Appeals in light of the passage of the 1977 Amendments.⁴⁶

While all of this administrative and judicial activity was occurring, Congress was also actively getting involved in the PSD controversy. Shortly after the original Sierra Club decision was announced, the Subcommittee on Air and Water Pollution of the Senate Committee on Public Works held extensive hearings solely on the issue of PSD.⁴⁷ Representatives from industrial and environmental groups both testified, but the thrust of the testimony emphasized their agreement or disagreement with the principle of PSD and not with its implementation.⁴⁸ At this time the original four EPA alternative proposals had been published, but, as stated earlier, there was no mention of the role of an FLM.

Further hearings were held in 1974 and 1975 after the role of the FLM became known.⁴⁹ During those hearings opposition to the federal designation of land as Class I became apparent. For example, a representative of Continental Oil Company prepared an overlay map of West Virginia and predicted that if all national parks, monuments, and forests within the state and in adjacent states were reclassified to Class I, there could be no further coal production, no coal gasification plants, no mine-mouth power generation, and no coal liquification facilities constructed.⁵⁰ He was particularly objecting to the fact that the redesignation was solely a matter of federal concern with the state and its citizens having little impact on the ultimate decision, although being directly and adversely affected by the decision. The problem of buffer zones around Class I areas to protect the integrity of the redesignation was also a focal point of attention.⁵¹ Similar problems were forecast for intensive development of oil shale in Colorado if all national forests and parks were to be reclassified to Class I.⁵²

The Director of the New Mexico Environmental Improvement Agency was one state official who spoke out strongly in favor of Class I redesignations.⁵³ He also did not oppose the granting of redesignation power to FLMs and Indian tribal councils as long as the state was made a part of the decisionmaking process. The interstate effects of redesignation were also discussed by Congress. Where national parks or forests are near state boundary lines, witnesses at the hearing recognized the need for cooperation and possible federal involvement to see that areas needing special protection received it even if that protection required redesignating areas outside the state where the sensitive area was located.⁵⁴

The hearings held by Congress in 1974 and 1975 led to various bills being presented to the House of Representatives and Senate in 1976. The House passed bill would have drastically curtailed

the role of the FLM in the redesignation process.⁵⁵ While basically utilizing the Administrator's Area Classification Plan, the House bill made some important changes. It first redefined the limits for the three classes that it created, the most important change limiting degradation in Class III areas to 50% of the secondary standards. It also designated about 95% of the United States land area as Class II. The only areas designated Class I were national parks and national wilderness areas over 25,000 acres in size. These were to be called mandatory Class I areas and could never be redesignated except, of course, by later congressional action. Other national parks and national wilderness areas between 10,000 and 25,000 acres in size were designated optional Class I areas with the state retaining the authority to redesignate to Class II.⁵⁶

The federal review role in the redesignation process was merely ministerial under the 1976 House bill. The Administrator was simply to verify that the procedures set out in the statute had been complied with. There would be no substantive review by the EPA.⁵⁷ In addition, there was no role for the FLM, although the House Report does suggest that states utilize the expertise and knowledge of the local FLMs whenever they deal with redesignations that might impact federal lands.⁵⁸ National forests under the House plan were to be redesignated as Class II areas but could not be redesignated to Class III if they were over 10,000 acres in size. The process for reclassifying, however, precluded any but an advisory role for the Forest Service land managers.⁵⁹

On the Senate side, S. 3219 was passed which included a different version of the PSD implementation solution.⁶⁰ The Senate bill did not allow for deterioration beyond the Class II increments. There was no Class III area as authorized by the EPA or proposed in the House bill.⁶¹ In addition, more lands were included within the original designation of Class I, including all national parks in excess of 6,000 acres and national wilderness areas in excess of 5,000 acres.⁶² All other lands were to be designated as Class II. The Senate bill retained a role for the appropriate FLM, requiring his concurrence before any national forest, national recreation area, or other federal land holding be reclassified to Class I.⁶³ The FLM was also to have an extensive role in state pre-construction review procedures where the new source might present a threat to a Class I federal land.⁶⁴ Powers of redesignation, however, were retained by the state although the Senate Report encouraged FLMs to take an active role in the PSD process.⁶⁵

Because of major discrepancies in the two bills the Conference Committee compromise did not receive approval by both Houses before the end of the 94th Congress.⁶⁶ However, the efforts of the 94th Congress did not go for naught, as the 95th Congress quickly reported out a compromise measure

which was passed by Congress and signed by the President in August 1977.

The 1977 Amendments did not drastically alter the EPA-developed PSD regulatory scheme.⁶⁷ The 1977 Amendments initially reaffirm Congress's intention to legislate a policy of PSD, thereby defusing any attempt to judicially overturn the earlier 4-4 affirmance by the Supreme Court of the principle of PSD.⁶⁸ The PSD program is to be implemented by the states who are under an obligation to revise their SIPs to include an approved PSD strategy.⁶⁹ As part of the SIP process the states are free to implement a more stringent PSD program than that mandated by Congress. In the interim period, the EPA is to implement the PSD program. The Administrator has implemented the congressional mandate by promulgating a dual set of regulations: one governing the PSD program while under the aegis of the EPA,⁷⁰ and the other providing the minimum requirements for SIP revisions so that the states may take over responsibility for PSD.⁷¹

The 1977 Amendments limit the initial designation of mandatory Class I areas to international parks and national wilderness areas which exceed 5,000 acres, national memorial parks which exceed 5,000 acres, and national parks which exceed 6,000 acres.⁷² These areas can never be redesignated to Class II except by later legislation. Any areas that had under the 1974 EPA regulations been reclassified to Class I would remain so but could be redesignated at a later date.⁷³ All other clean air areas are initially designated Class II.⁷⁴

The 1977 Amendments also retained the EPA position of regulating only two of the six pollutants for which national ambient air quality standards had been set, namely, particulate matter and sulfur dioxide. The Administrator, however, is required to prepare studies regarding PSD programs for hydrocarbons, carbon monoxide, nitrogen oxides, and photochemical oxidants within two years of enactment.⁷⁵ The Administrator is then authorized to promulgate PSD regulatory programs for these pollutants.

The new Act also kept the tripartite division into Classes I, II, and III. The maximum allowable increments for the Class I areas were the same as contained in the earlier EPA regulations: namely, 5 micrograms/cubic meter, annual geometric mean, 10 micrograms/cubic meter 24-hour maximum for particulates, 2 micrograms/cubic meter, annual arithmetic mean, 5 micrograms/cubic meter 24-hour maximum, and 25 micrograms/cubic meter 3-hour maximum for sulfur dioxide.⁷⁶ The allowable increments for Class II emissions were the same as had been proposed in the 1976 Amendments: 19 micrograms/cubic meter annual geometric mean, 37 micrograms/cubic meter 24-hour maximum for particulates, 20 micrograms/cubic meter annual arithmetic mean, 91 micrograms/cubic meter

24-hour maximum, 512 micrograms/cubic meter 3-hour maximum for sulfur dioxide.⁷⁷ These increments differed from the EPA regulations in that a greater degree of deterioration was allowed using the annual arithmetic mean as a measuring device while lower amounts of emissions would be allowed using the 24-hour maximum and 3-hour maximum measuring devices for sulfur dioxide. The 1977 Amendments retained the concept of Class III deterioration but did not allow deterioration up to the national secondary standards as had been utilized in the EPA regulations. The Class III increments are 37 micrograms/cubic meter annual geometric mean, 75 micrograms/cubic meter 24-hour maximum for particulates, 40 micrograms/cubic meter annual arithmetic mean, 182 micrograms/cubic meter 24-hour maximum, 700 micrograms/cubic meter 3-hour maximum for sulfur dioxide.⁷⁸ The Class III increments are approximately 50% of the national secondary standards.

Increment consumption is a one-shot phenomenon. Once the increment is used, unless emissions from existing sources are diminished, no further emissions of particulates or sulfur dioxide are allowed. The EPA attempted to make the increment limits more flexible by excluding certain types of emissions from increment consumption.⁷⁹ These exclusions must be requested by a governor after providing adequate notice and a public hearing on the issue.⁸⁰ Emissions caused by a change in fuels under an ESECA or FPC order can be excluded from the increment. Particulate emissions attributable to construction or other temporary activities can also be excluded. Finally, contributions to the ambient air attributable to foreign sources may be excluded from the increment consumption.⁸¹

These increments are to be measured against the baseline concentrations of particulates and sulfur dioxide.⁸² The 1977 Amendments define baseline concentrations to be the ambient air quality levels at the date that the first PSD permit is sought plus the projected emissions from any major emitting facility which began construction prior to January 6, 1975, but which is not yet in operation.⁸³ The increments are further limited in areas where the baseline concentrations are close to the secondary standards because in no event may the national primary or secondary standards be violated.⁸⁴ The EPA regulations attempt to make somewhat easier the determination of what the baseline is by having the states determine the existing ambient air quality on August 7, 1977, and then subtracting from that figure the contributions from all major sources that were constructed or modified after January 6, 1975.⁸⁵

The greatest changes in the PSD scheme came in the area of redesignation procedures.⁸⁶ States are given the primary role in the redesignation process. They cannot, however, affect any of the congressionally designated mandatory Class I areas mentioned above.⁸⁷ The following areas, in addition, can only be redesignated Class I from their present Class II status: national monuments, national primitive areas, national preserves, national recreation areas, national wild and scenic

rivers, national wildlife refuges, a national lakeshore or seashore, and subsequently created national parks or wilderness areas which exceed 10,000 acres.⁸⁸ All other PSD areas can be redesignated to Class III.

Prior to any redesignation the state must meet several requirements. The state must hold a public hearing and a satisfactory description and analysis of the health, environmental, economic, social, and energy effects of the proposed redesignation must be prepared and made available for public inspection at least 30 days prior to said hearing.⁸⁹ If the redesignation affects any federal lands or other states, the state must provide written notice to the appropriate FLM or state 30 days prior to the hearing and afford adequate opportunity to have them confer with the state.⁹⁰ If the proposed redesignated areas include federal lands, the state must provide the appropriate FLM no more than 60 days notice in order to afford the manager the opportunity to submit any written comments.⁹¹ The statute and regulations define the FLM as the Secretary of the department with authority over the lands.⁹² If any inconsistencies exist between the FLM's report and the state's report, the state must publish a list of such inconsistencies and an explanation of them, together with the rationale behind the state's decision to go against the recommendation of the FLM.⁹³ This is the only opportunity for FLMs over Class II areas to participate in the redesignation process. The role is advisory only as the states are free to ignore the manager's comments after making them public. A final requirement for redesignation is that the state has consulted with the elected leadership of local and other substate general purpose governments in the targeted area.⁹⁴

In addition, before a state can redesignate any area Class III some further requirements are imposed.⁹⁵ The redesignation must be specifically approved by the governor after consultation with the appropriate state legislative committees if the legislature is in session. If the legislature is not in session, the governor must consult with its leadership. Furthermore, the legislative bodies of the general purpose units of local government representing a majority of the residents of the redesignated area must enact legislation or pass resolutions concurring in the redesignation.⁹⁶ The redesignation also must not cause the violation of any national standard in any other area. Finally the governor must make public any pending PSD permit application which could only receive a permit if the area were redesignated to Class III.⁹⁷

The EPA role in reviewing redesignations is quite limited. The EPA may only disapprove a state redesignation if it determines that the procedural requirements of the statute have not been met.⁹⁸ This determination can only be made after a public hearing is held.

FLMs must review all national monuments, primitive areas and national preserves and recommend areas for redesignation to Class I where air quality-related values are important attributes of the area.⁹⁹ The FLM must "consult" with the states before making the recommendation. After this consultation the FLMs must submit their recommendations with supporting analysis to the Congress and affected states by August 1978.¹⁰⁰

The role of the FLM is thus reduced to an advisory one although steps are taken to insure that the advice of the FLM cannot be hidden or ignored by the state without giving the affected public a chance to voice their opinion. The land manager has been relegated to the position of input provider rather than decisionmaker. The veto and redesignation authority given the FLM in both the 1974 EPA regulations and proposed 1976 Amendments have been stripped away.

The basic regulatory system calls for preconstruction review of all new major emitting facilities.¹⁰¹ A major emitting facility (MEF) is defined to include all new or modified facilities which have the potential to emit 100 tons or more per year of any air pollutant from some 30 specified industrial processes or 250 tons per year for all other resources.¹⁰² All MEFs must seek a PSD permit before they can begin construction.¹⁰³ Because potential to emit was the amount of uncontrolled pollutants, it was estimated that some 4000 PSD permits would have to go through an extensive air quality review including public hearings,¹⁰⁴ case-by-case determination of best available control technology (BACT),¹⁰⁵ modeling¹⁰⁶ monitoring,¹⁰⁷ and other informational studies.¹⁰⁸ Because this review would tax state and federal environmental agencies to the fullest, the EPA opted to exclude a class of sources from the complete PSD permit review process.¹⁰⁹ Thus all sources which when controlled by the applicable SIP emission limitation will emit less than 50 tons per year, 1,000 pounds per day, or 100 pounds per hour (whichever is more restrictive) may bypass the full PSD permit process.¹¹⁰ Finally the statute requires the MEF to analyze the air quality impacts of growth associated with the MEF.¹¹¹ The EPA apparently will look at these issues but not deny a permit because of associated growth problems.¹¹²

If a PSD permit is sought for an MEF which will have an impact on a Class I area several additional requirements must be met. All PSD permit applications must be forwarded from the states to the Administrator.¹¹³ The Administrator is then under a mandatory duty to notify both the FLM and the federal official charged with direct responsibility for managing a Class I area of the proposed MEF.¹¹⁴ The Administrator had to promptly forward to the affected officials copies of any preliminary determinations made by him regarding the permit.¹¹⁵

The FLM and the federal official charged with direct responsibility of managing a Class I area are both given an affirmative responsibility to

protect the air quality-related values, including visibility, of all Class I areas.¹¹⁶ Those officials must, after consultation with the Administrator, ascertain whether the new source will have an adverse impact on such values.¹¹⁷

The Administrator specifically eschewed the notion of attempting to define what air quality-related values are in promulgating the PSD regulations.¹¹⁸ Besides visibility, air quality-related values may include such diverse problems as "acid rain" damage to sensitive flora and fauna, odor, and geologic or cultural characteristics.¹¹⁹ The EPA left this determination to be made by the affected agency on a case-by-case basis.¹²⁰

In any case where the FLM, other responsible federal official, or the Administrator files a notice alleging that the facility will have a potential adverse impact on a Class I area, no permit shall be issued by either the state or the EPA until the owner or operator demonstrates that the emissions of particulate matter and sulfur dioxide will not cause an increase over the maximum increments allowed for Class I areas.¹²¹ This is not a likely deterrent for PSD permit applicants because they would never have begun the process unless their own modeling analysis predicted emissions that would not violate the Class I increments. The FLM or other responsible federal official will have to scrutinize closely all PSD permit applications because of their affirmative responsibility. The EPA has suggested that a "rule of thumb" distance of 50 kilometers be utilized in initially assessing the potential adverse impact of an MEF on a Class I area, but it says MEFs further away may still have to seek a PSD permit. The EPA or the state with an approved SIP still retains the decisionmaking authority. There is no provision regarding the situation where the FLM and the state disagree on the impact of the MEF. The FLM may have to litigate the issue attempting to prove that the state's decision was unreasonable.

The FLM also may attempt to demonstrate to the satisfaction of the state or EPA that the MEF will have an adverse impact even though the Class I increments will not be violated.¹²² If the state or EPA concurs, no PSD permit will be issued. Again, there is no dispute-resolving mechanism provided. The state or EPA will make the final decision.

The Act also provides for two types of variances from the Class I increments. In cases where the facility will cause a violation of Class I increments a state can still issue a permit if the owner or operator can demonstrate to the satisfaction of the FLM, who must so certify, that there will be no adverse air quality-related impacts even though the Class I increments will be violated.¹²³ In these cases a state is authorized, but not required, to issue a permit if the new source does not violate Class II increments except for a lower 3-hour maximum standard for sulfur dioxide of 325 micrograms/cubic meter.¹²⁴

The second variance deals specifically with the problem of excessive emissions of sulfur dioxide so that the first type of variance may not be issued.¹²⁵ A governor can grant this sulfur dioxide variance on a finding that the facility cannot be constructed by reason of a violation of the maximum allowable increase in sulfur dioxide for periods of 24 hours or less. Where a mandatory Class I area is affected, the FLM must certify that the issuance of the variance will not adversely impact the air quality-related values including visibility over the federal lands.¹²⁶ The MEF, to receive this variance, must prove that it will not violate the Class I increments more than 18 days per year.¹²⁷ A violation of the 3-hour increments is considered a full day violation.¹²⁸

In addition, the MEF is subject to a different set of increments. The applicable increments for this variance which can be recorded more than 18 days per year are classified in terms of low and high terrain areas.¹²⁹ The EPA has defined high terrain to mean any area having an elevation of 900 feet or more over the base of the stack.¹³⁰ For low terrain the increments are 36 micrograms/cubic meter, 24-hour maximum and 130 micrograms/cubic meter, 3-hour maximum.¹³¹ The high terrain increments are 62 micrograms/cubic meter, 24-hour maximum and 221 micrograms/cubic meter, 3-hour maximum.¹³² This variance was included to deal with the problem of the Intermountain Power Project.¹³³

If the FLM does not concur and the Governor would still like to license the facility, an appeal to the Office of the President is allowed.¹³⁴ The President can allow such a variance if he finds it to be in the public interest. This decision must occur within 90 days of receipt of the gubernatorial request and is not reviewable in any court.¹³⁵ The MEF is still subject to the applicable increment requirements.

The EPA is further required to prepare within six months regulations dealing with the needed air quality review and air quality models necessary to predict air quality impacts of MEFs.¹³⁶ These regulations, however, cannot impose automatic or uniform buffer zones as a tool for implementing PSD.¹³⁷ In promulgating the PSD regulations the Administrator has incorporated by reference the EPA publication series entitled "Guideline on Air Quality Models" as the reference point for the use of models.¹³⁸ Changes may be made from the Guidelines only where appropriate and after notice and an opportunity to be heard is granted.¹³⁹ Written approval of the Administrator is required before these changes in modeling techniques can be utilized. The Administrator also is required to hold a modeling conference within six months of enactment of the 1977 Amendments and at least every three years thereafter in order to ascertain the state-of-the-art.¹⁴⁰

The EPA's 1978 PSD Regulations were challenged in court by both industry and environmental groups.

In a lengthy opinion the District of Columbia Court of Appeals in Alabama Power Co. v. Costle reviewed the 1978 regulations in their entirety. The court upheld part of those regulations and overruled other portions. That decision was issued in December 1979.

The Alabama Power court rejected the EPA's definition of major emitting facility (MEF) subject to PSD review. The EPA had interpreted the statutory language "potential to emit" to mean a source's emissions without consideration of applied or designed control technology. Because this definition would embrace so many sources, the EPA's 1978 Regulations included a blanket exemption of all sources emitting less than 50 tons of a pollutant per year.

The court held that the definition of MEF had to be based on actual emissions considering control technology, built-in or designed for the source. It also concluded that the EPA lacked the authority to grant blanket exemptions from congressionally mandated regulatory programs. The court acknowledged an agency has authority to allow exemptions for de minimis cases or those based on administrative necessity. But those exceptions to a regulatory program are very limited.

In addition, the court held that the EPA uniform date to determine the baseline concentration was contrary to the 1977 Amendments. The court stated that the 1977 Amendments were clear that the baseline date is the date of the first application for a PSD permit. At that time the applicant can provide useful data to assist in determining the baseline concentration.

The 1978 PSD Regulations were modified by EPA to conform to the court's opinion in Alabama Power. On August 7, 1979, the EPA promulgated the current PSD Regulations.¹⁴² The PSD regulations now define MEF based on the actual emissions of the source in light of its operating or planned control technology. The EPA did create de minimis exemptions from the PSD review. The state in its SIP may exempt new sources or major modifications if they do not result in an emissions increase from the source or a net increase of a pollutant from a modification over specified quantities for different pollutants. The regulations no longer include a blanket exemption.

The 1979 regulations provide a different date to determine the baseline concentration for a PSD area. That date is the day of the first application for a PSD permit in the area. Also, the current regulations do not mention a rule of thumb zone for presuming an impact on a mandatory Class I area.

The 1979 regulations did not change the basic redesignation process. The role of the FLM remains primarily advisory, except for the affirmative duty concerning Class I areas.

In addition to the basic PSD program, Congress added a specific new program designed to protect visibility in mandatory Class I areas.¹⁴³ The prevention of future and the remedying of past visibility impairment activities is considered to be a national goal.¹⁴⁴ The visibility protection program places more decisionmaking authority with both the FLM and the Administrator than does the general PSD program.

The Secretary of Interior, in consultation with other FLMs, was given six months to promulgate a list of mandatory Class I areas where visibility is an important value.¹⁴⁵ The Administrator has one year after the list is filed to promulgate a final list.¹⁴⁶ This list was issued in final form on November 30, 1979.¹⁴⁷ The Administrator has to complete by February 1979 a study of how the government can best achieve the implementation of the visibility protection goal.¹⁴⁸ By August 1979 the Administrator must promulgate the visibility regulations that will assure reasonable progress towards achieving the natural goal of visibility protection.¹⁴⁹ These regulations must at a minimum provide guidelines for the states to protect visibility and require each SIP to control emissions which contribute to the visibility problem. The Administrator is also directed to control fossil-fuel generating plants having a capacity of greater than 750 megawatts, preempting any state action over those facilities.¹⁵⁰ Variances from the emission limitations contained in the EPA guidelines are authorized if the resulting emissions will not have an adverse impact on visibility in any mandatory Class I area. But before this exemption can be granted, the affected FLM must concur on the EPA's determination of no adverse impact.¹⁵¹ This gives FLMs a veto power over visibility variances.

Since visibility protection is to be part of the SIP the states must hold public hearings before they adopt the needed visibility protection regulations.¹⁵² The state, however, must consult "in person" with the appropriate FLM and must include a summary of the conclusions and recommendations of the manager in publishing the required public notice.¹⁵³ Finally, the statute prohibits the Administrator from requiring an automatic buffer zone as a means of protecting visibility.¹⁵⁴

In December 1980 the EPA promulgated its protection of visibility regulations.¹⁵⁵ The regulations apply to every state that has a federal mandatory Class I area or has sources whose emissions may affect visibility in those areas. These regulations require states to provide means to make reasonable progress toward the congressional goal of remedying existing and preventing future impairment of visibility. It also provides procedures for a visibility impact analysis for major new sources or modifications. The definitions of MEF and major modification are basically the same as for the PSD program.

The visibility regulations define "adverse impact on visibility" as "visibility impairment

which interferes with the management, protection, preservation, or enjoyment of the visitor's visual experience of the Federal Class I area."¹⁵⁶ This determination depends on several factors, including the frequency, duration, and extent of the impairment, natural conditions, and times of visitor use of the area. It does not include effects on integral vistas.

"Integral vista" is defined as "a view perceived from within the mandatory Class I Federal area of a specific landmark or panorama located outside the boundary of the mandatory Class I Federal area."¹⁵⁷

The primary responsibility for carrying out the visibility regulations rests with the states.¹⁵⁸ The states must determine which existing sources cause or contribute to impairment of a federal Class I area. Those sources must install the best available retrofit technology (BART) to correct the adverse impact on visibility. A SIP must be revised to include means to prevent future impairment, remedy existing impairment, and make a visibility impact analysis. These efforts must be closely coordinated with FLMs.

The role of the FLM in the visibility protection is major. The FLM is to assist the state by submitting a list of integral vistas, identifying visibility impairment in any federal Class I area, and identifying elements to include in the visibility monitoring strategy the state must implement.

On or before December 31, 1985, the FLM must determine any integral vista.¹⁵⁹ That determination is to be made according to criteria developed by the FLM. The promulgation of criteria must be preceded by reasonable notice and opportunity for public comment on the proposed criteria. The FLM must notify the state of any integral vista determinations and the reasons for it. The integral vista must be listed in the SIP or revisions to it.

Development of the criteria is important because the state does not have to include any integral vista not identified according to the criteria.¹⁶⁰ The state is to defer to the expertise of the FLM respecting judgments under the criteria. However, if the state disagrees on the identification, it does not have to list the challenged one. The state must give the FLM an opportunity to consult with the governor of the state when the state and FLM disagree on identification of any integral vista.

The SIP must be revised to allow new source review for visibility impact.¹⁶¹ The state must give the affected FLM written notice and all relevant information from a major new source or major modification that may affect visibility in a federal Class I area. The notice must be sent within 30 days after receipt of the application

and at least 60 days before any public hearing by the state on the application. The notification has to include an analysis of the anticipated impacts on visibility in any federal Class I area. If a state receives advance notice of a permit application of a source that may affect visibility, it must notify all affected FLMs within 30 days after the advance notification.

The FLM must conduct visibility impairment analysis of the applicant, and the state must consider the analysis.¹⁶² If the state disagrees and the applicant will impact visibility, the state must explain why the FLM analysis did not establish the fact of impact to the state's satisfaction.

The SIP also has to consider the visibility impact of major sources or modifications on integral vistas identified according to the criteria and included in the plan.¹⁶³ The vista must be identified at least 12 months before the permit application is complete, unless the FLM has given notice and an opportunity for hearing. In the latter case the vista must be included if it was identified at least 6 months before completion of the application.

As necessary, a state may require appropriate monitoring of visibility in a federal Class I area near the proposed new source or modification.¹⁶⁴ The state plan must include visibility evaluation by visual observation or other monitoring techniques.¹⁶⁵

The SIP must be revised to include long-term strategies of 10 to 15 years for achieving the national visibility goals.¹⁶⁶ The long-term strategy must be coordinated with existing plans and goals of an area, which include plans and goals provided by the FLM. Moreover, the long-term strategy must be reviewed every three years. The review process has to provide for consultation with the appropriate FLMs.

Sources required to apply BART may apply to the Administrator for an exemption.¹⁶⁷ The exemption application must include all documentation and establish that the source does not or will not alone or in combination with other sources, emit pollutants that will impair visibility in any protected area. Certain other conditions must be met to get an exemption. The source has to provide prior written notice of the exemption application. The FLM must prepare its recommendation on the disposition of the application. The FLM's recommendation becomes part of the application.

Within 90 days of receipt of an exemption application the Administrator must provide notice and an opportunity for public hearing. The Administrator may then grant or deny the application. The exemption becomes effective, however, only if all affected FLMs concur in the Administrator's determination.¹⁶⁸

Thus greater responsibility is placed on the FLM to implement the visibility protection program

under the 1977 Amendments. The FLM has to establish criteria to determine integral vistas, and then must identify integral vistas and notify the state of them. In addition, the FLM participates in new major source or modification review to determine if proposed emissions will affect visibility in a federal Class I area. Similarly, the FLM works with the state in developing a long-term strategy for making reasonable progress toward remedying existing and preventing future visibility impairment. Lastly, the FLM makes recommendations concerning the disposition of an exemption application from BART for existing sources and must concur in an exemption before it is effective.

The principal issue for the FLM under the PSD program is how to deal with the affirmative responsibility to protect the air quality-related values including visibility in Class I areas. The EPA has refused to define either "affirmative responsibility" or "air quality related values" other than visibility. Thus it is left to the FLM and the federal officials charged with direct responsibility over Class I lands to fill in the gaps on a case-by-case basis. Each land management or planning decision that will possibly impact the air quality over a Class I area will have to consider that impact given this affirmative responsibility to protect the air.

(b) State Permit Requirements

The 1970 Amendments directly addressed the problem of how to control emissions of air contaminants from federal facilities.¹⁶⁹ It was clear that to require a state to meet national ambient air quality standards while exempting from the regulatory system those emissions originating from federal facilities would provide little incentive for the states to strongly support the implementation of the Act. Thus, in 1970 Congress included a provision which required each department, agency, and instrumentality of the federal government having jurisdiction over any property or facility or engaged in any activity which results or may result in the discharge of air pollutants to comply with federal, state, interstate, and local requirements respecting control and abatement, to the same extent that any person is subject to such requirements.¹⁷⁰

An immediate problem arose in determining whether a federal facility need comply with so-called procedural requirements of the SIP, namely submitting a permit application, meeting the monitoring and reporting provisions of the SIP, and others. In fact, several independent agencies, notably TVA, were particularly recalcitrant about ceding any authority to state agencies to control their emissions.

The dispute ended with litigation after several agencies refused to either seek state permits for their polluting facilities or to

otherwise comply with SIP recordkeeping and monitoring duties. After two different courts of appeal reached different conclusions, the United States Supreme Court in Kentucky ex rel. Hancock v. Ruckeshaus¹⁷² decided the issue in favor of limiting state control over federal facilities to substantive emission limitations, freeing the federal facilities from the permit and other so-called procedural requirements.¹⁷³ The Court would not lightly cede federal supremacy to state procedural requirements. The 1970 Amendments did not provide a clear mandate to subject federal agencies to state control given the complex scheme for regulating existing sources of air pollution.¹⁷⁴

Whatever the Supreme Court might have thought about congressional intent, the result was clearly not one the Congress desired. In the 1976 Amendments the changing of the statute to make it clear that the federal facility must meet all state procedural rules was labelled "non-controversial."¹⁷⁵ As finally amended, section 118 requires that all federal facilities must comply with state and local requirements, including procedural matters such as recordkeeping, reporting, or permit application.¹⁷⁶ Thus, it is clear that all federal agencies which engage in air polluting activities must meet all state substantive and procedural rules contained in the SIP.

This requirement imposes a heavy burden on lower level federal managers who are responsible for the day-to-day workings of federal lands. SIPs may contain permit and other requirements for such diverse activities as open burning, indirect source construction, fugitive dust control, and ordinary stack emissions. Clearly the federal agency and its permittees must comply with all SIP requirements before they can operate. Operating outside the SIP, federal facilities would be subject to both government and private enforcement actions.

(c) Nonattainment Areas

Because the 1970 Amendments envisioned the attainment of the national primary ambient air quality standards by either mid-1975, or in exceptional cases mid-1977, the Amendments did not provide for a program to deal with the reality of nonattainment. As a result the EPA was thrust into the position of developing a strategy for these areas since it was apparent that a substantial portion of the country could not achieve the 1975 goals. In December 1976 the EPA published its Interpretive Ruling, which would allow for growth in areas which had not yet attained health-protecting air quality.¹⁷⁷

This so-called Emissions Offset Program (EOP) was immediately effective for all nonattainment areas. Because there was much controversy about EOP, it was not surprising that the 1977 Amendments legislated their own program for these areas. But because of the time needed to develop

these nonattainment area programs, Congress opted to continue, with minor modifications, the EOP through July 1, 1979.¹⁷⁸ Congress did provide a mechanism for states to waive the application of the EOP, but the burdens are so awesome no state has yet to receive an EOP waiver.¹⁷⁹

The EOP, which is effective through June 30, 1979, has recently undergone EPA scrutiny, and certain proposed changes have been published.¹⁸⁰ The basic regulatory device is pre-construction review for all new sources to see if they will meet the applicable emission limitations.¹⁸¹ The earlier EOP required MEFs to undergo a more complete air quality review. MEFs were defined to include only those facilities which had "allowable emissions," after controls of 100 tons per year. In order to bring the EOP into conformance with the 1977 Amendments,¹⁸² the EPA has proposed changing the definition of MEF so that it is identical with the definition of MEF utilized in the PSD program.¹⁸³ Thus only sources which have allowable emissions exceeding 50 tons/year, 1000 lbs/day, or 100 lbs/hour will have to undergo the extensive EOP, while other MEFs with potential (uncontrolled) emissions of 100 tons/year or more are excluded from the full EOP review.¹⁸⁴

For MEFs that cause or contribute to a violation of national ambient air quality standards the full-blown EOP is applied. The proposed EOP defines "significance levels," i.e., that increment necessary to cause or contribute to a violation, as: 1 microgram/cubic meter annual average, 5 micrograms/cubic meter 24-hour average, 25 micrograms/cubic meter 3-hour average, sulfur dioxide; 1 microgram/cubic meter annual average, 5 micrograms/cubic meter 24-hour average, particulates; 1 microgram/cubic meter annual average, nitrogen oxides; and 0.5 milligrams/cubic meter 3-hour average and 2 milligrams/cubic meter 1-hour average, carbon monoxide.¹⁸⁵ No significance level was set for photochemical oxidants because atmospheric stimulation models have not been developed to accurately predict the impact of a single source.¹⁸⁶

For sources that contribute to or cause violations the proposed EOP will require four conditions be met before a permit will be issued.¹⁸⁷ First, the new source must utilize the lowest achievable emission rate (LAER) for such source. Second, the source owner or operator must certify that all existing sources owned or operated by the applicant are in compliance with the applicable emission limitations. Third, emission reductions or offsets from existing sources in the area are required so that reasonable further progress is made towards achieving the national ambient air quality standards. No interpollutant offsets are allowed (no trading hydrocarbon emissions for sulfur dioxide emissions).¹⁸⁸ The baseline for determining the offsets is the level of emissions allowed under the then existing SIP.¹⁸⁹ This

represents a change in the baseline as defined in the 1976 EOP, which measured the baseline either in terms of the applicable SIP (if it was designed to attain the standards), or by the emission limitations deemed necessary to achieve those standards (if the SIP was too lenient).¹⁹⁰ This change was mandated by Congress in the 1977 Amendments.¹⁹¹ Fourth, the offsets must provide a net air quality benefit in the affected area. The purpose of this condition is to ensure that offsets are realized in the same geographic area as the new source.¹⁹²

For the post July 1, 1979, period the 1977 Amendments initiated a new program for the non-attainment areas.¹⁹³ Basically the states have until July 1, 1979, to submit SIPs that will demonstrate attainment of all national ambient air quality standards by December 31, 1982.¹⁹⁴ The Act also provides for an extension to 1987 for carbon monoxide and photochemical oxidants¹⁹⁵ if attainment by 1982 cannot be achieved through the implementation of all reasonably available measures.¹⁹⁶ The state must hold a public hearing prior to the SIP submission to the EPA.¹⁹⁷ The SIP must require in the pre-1982 period "reasonable further progress" toward attaining the standards.¹⁹⁸ Reasonable further progress is defined to mean annual incremental reductions sufficient to meet the 1982 deadline.¹⁹⁹

The SIP also must contain a complete emission inventory for all nonattainment areas. The SIP has to provide for a permit system for major new or modified sources.²⁰¹ The permitting system must at a minimum analyze each MEF to determine whether its emissions, when added to the emissions from non-MEF sources, are sufficiently less than the total emissions allowed for existing sources under the SIP so as to constitute reasonable further progress towards attaining the 1982 goals.²⁰² This requirement is essentially a trade-off although it is more flexible in that it may allow use of the so-called "bubble" concept whereby net emissions may be lowered through controls throughout the industrial site and not merely on the new stack. The permit cannot be issued unless the new source is applying LAER and all other MEFs owned or operated by the applicant are in compliance with the applicable SIP emission limitations.²⁰³

The SIP must also contain a program for consultation and cooperation among state and local governments at the planning level.²⁰⁴ This process must include a mini-environmental impact analysis of the SIP provisions needed to attain the 1982 goals. Finally the SIP must contain written evidence that both the state and local governments have the legal authority to enforce the necessary SIP provisions.²⁰⁵

The states are given an added incentive to submit a qualified SIP because the 1977 Amendments authorize the Administrator and the Secretary of Transportation to withhold federal highway money from states that have not submitted qualified SIPs

by July 1, 1979.²⁰⁶ Additionally, no federal agency or department can engage in, support, license or permit, or approve any activity if it does not conform to the SIP.²⁰⁷ This assurance of conformity is an affirmative responsibility of each federal agency head,²⁰⁸ including Forest Service personnel. Finally each federal agency having the authority to support any program with "air-quality related transportation consequences" shall give priority for allocations among the states to the implementation of those SIP provisions necessary to achieve and maintain the national primary ambient air quality standards.²⁰⁹ The language is broad enough to include any possible Forest Service high construction.

The EOP and nonattainment area plans also had to be modified to conform to the decision in Alabama Power Co. v. Costle.²¹⁰ The changes adopted the PSD program definitions of new sources and major modifications based on actual emissions. In addition, the blanket 50 ton/year exemption was deleted. The bubble concept was retained in both the nonattainment and PSD programs.²¹¹

The EOP and nonattainment area programs are not directly applicable to Forest Service activities. Where federal lands are located in non-attainment areas, however, it is clear that under section 118 the Forest Service is subject to their requirements. After July 1, 1979, all Forest Service personnel managing lands in non-attainment areas must be aware of the SIP because they cannot license, support, or approve any activity which is not in conformance with the SIP. This affirmative responsibility may affect Forest Service land management decisions especially in areas which have not attained the national standards for automobile-related pollutants. All activities which are likely to increase motor vehicle traffic will have to be scrutinized in light of the applicable SIP.

(d) Indirect Source Review

A fourth program used to control air pollution is the preconstruction review of indirect sources of pollution, i.e., those facilities which do not directly pollute but which attract mobile sources of pollution. Under the 1970 Amendments states were authorized to regulate indirect sources, the principal target being metropolitan parking lots.²¹² This review procedure was necessary because most metropolitan areas did not meet air quality standards for automobile-related pollutants. Indirect sources included facilities, buildings, structures, or installations which attract or may attract mobile source activity which results in emissions of pollutants for which there is a national ambient air quality standard.²¹³

The early EPA regulations denoted projects such as highways, roads, parking facilities,

recreation, amusement and entertainment facilities, airports, office and governmental buildings, apartments, and education facilities as being typical indirect sources.²¹⁴ Under the EPA regulations there were two different thresholds of development which would trigger indirect source review. Within Standard Metropolitan Statistical Areas (SMSA) the following had to be reviewed by the state: any new parking facility or any indirect source with an associated parking area of 1,000 or more cars; any modified parking facility or other facility which increases parking capacity by 500 cars; any new highway project which will have an average annual daily traffic volume of 20,000 or more vehicles/day within 10 years; any modified highway project which will increase average annual daily traffic volume by 10,000 vehicles/day within 10 years.²¹⁵ For areas outside the SMSA, the threshold levels of review were increased to 2,000 cars for new parking facilities, or 1,000 additional cars for a modified parking facility, or any adequate parking for any airport which is used by more than 1.6 million passengers/year.²¹⁶

The indirect source review program attracted much controversy because of its wide-ranging land use impact. As a result of state and interest group lobbying efforts, the Energy Supply and Environmental Coordination Act of 1974 (ESECA) withdrew from the EPA its authority to impose indirect source review on states which had refused to include them in their SIP submittal.²¹⁷ States could still voluntarily retain indirect source review programs within the SIP. The Administrator could approve an indirect source review program that the state wished to implement on its own initiative, but was barred from imposing one on an unwilling state. The 1977 Amendments retained the voluntary nature of the indirect source review program.²¹⁸ The Act specifically allows states to have an indirect source review program but forbids the Administrator from requiring one as a condition of approval of an SIP. Presently there are some 18 states with an indirect source review program as part of their SIP.²¹⁹

The 1977 Amendments specifically authorize, but do not require, the Administrator to promulgate, implement, and enforce regulations for an indirect source review program which apply only to "federally-assisted highways, airports and other federally-assisted indirect sources and federally-owned or operated indirect sources."²²⁰ An indirect source is defined to include any facility, building, structure, installation, road or highway, including parking lots, which may attract mobile sources.²²¹ The regulatory program can include facility-by-facility preconstruction or premodification review to see that measures are taken which assure that a new or modified indirect source will either not cause or contribute to the violation of any national standard or not prevent the maintenance of such standard once achieved.²²² The 1977 Amendments do not further define the projects which can be covered under an indirect source review program. For example, do federal permittees need to undergo review if they construct

an indirect source? The only guidance from the legislative history is that "federally funded" does not include loan guarantees or deposit insurance programs.²²³ To date the Administrator has not chosen to impose any federal indirect source review program.

(e) Some Problem Areas--A Short Summation

The 1970 and 1977 Amendments have both direct and indirect impacts on the planning and management functions of the Forest Service. The most direct impact is through section 118, which requires that all federal agencies comply not only with the substantive but also with the procedural requirements of the SIP as if it were a private person or corporation. Thus, in planning or managing any potential stationary source of air contaminants, the Forest Service will have to meet all of the applicable requirements of the state-adopted SIP. This entails knowledge of the SIPs, since there is one for each state, and may involve two different control strategies and limitations for the same forest or planning unit if they happen to lie in two different states.

This requirement injects another layer of governmental approval prior to the installation or construction of any facility which will emit air contaminants. Approval would also be needed for open burning, which most states regulate through a permit system. While the Forest Service has been under a continuing duty to meet emission standards set by the state for their activities, the Forest Service will now have to seek construction and/or operating permits, provide testing and monitoring systems and prepare reports. This may add more time to the implementation of any proposed use of Forest Service land. Sufficient lead time will have to be allowed to plan for the state permit approval system to function. Thus, good planning may require early state involvement.

In addition, the permit requirements take on further importance when tied in with other programs, such as PSD, nonattainment area, and indirect source review. Obviously, the state system will have to be considered when the Forest Service plans land uses which may intensively develop any particular area of a national forest, such as through a ski resort or other recreational use which will cause a significant increase in vehicular miles travelled. The obvious ramifications of such planning (considering the topographical, climatological, and geographical conditions of the area, such as the natural air pollutant catch-basins of Aspen and Vail, Colorado) epitomize some of the consequences of the failure to include these considerations in the planning process. In developing plans, the Forest Service will have to consider the proposed activity and will have to go through the usually lengthy indirect source review procedure which the state may develop.

The Forest Service may now have to budget more time, money, and man-hours in order to meet the state's procedural requirements for stationary sources of air pollution operated by the Forest Service. Permit applications will have to be filed, and they may be time-consuming. Projects should not be delayed because of late applications, and mention must be made in the management and planning of projects for the requisite submission of the necessary forms and permits through the applicable state agency.

Another mandatory requirement may in the future affect the Forest Service planning and management functions through the indirect source review program for federally-owned, operated, or assisted facilities. If the Forest Service is going to own, operate, or assist in the construction of an indirect source, including highways and quite probably recreational facilities, it will have to meet the rules which the Administrator has the authority to promulgate. Undoubtedly, the regulatory program will entail preconstruction review of all indirect sources which meet the minimum threshold requirement of either threatening the attainment of a national primary or secondary ambient air quality standard or threatening the maintenance of those standards, once attained. It will be up to the Administrator to decide what size project will be included as coming under the review process, but clearly requirements will be as strict as the earlier suspended regulations for all indirect sources.

The review program also probably will require some sort of preconstruction or premodification permitting program with the EPA being allowed to condition the granting of any permit so that air pollution problems are minimized. Clearly any large-scale highway project or large-scale ski resort or other recreational facility will then have to come under EPA scrutiny. Thus, it is imperative that the Forest Service in preparing integrated plans consider the impact of the development on existing air quality, including the need to utilize modeling devices to predict effects so that compromise rather than conflicts with the EPA can be produced. Obviously, no matter what the integrated plan might call for, if the EPA decides that the project is violating its minimum criteria for increasing vehicular based air pollution, the project will not receive the necessary approval. It seems clear that, at a minimum, road or highway construction within national forests would fall under any federal indirect source review program.

This indirect source review program dealing with federally-owned, federally-operated, or federally-assisted facilities adds another external layer of review outside the Forest Service which will affect and enter into the internal Forest Service planning and management decisions. For example, if any new recreational facility is planned for a particular region and a new road is going to be built to provide access, it appears that the Forest Service will have to seek pre-

construction review of that project from the state, if applicable, or the EPA, if it promulgates its own regulations. The EPA can opt to impose conditions upon the project which may not coincide with the integrated plan. This new level of review would seem to require that in the integrated planning process care be taken to ascertain existing air quality within the planning unit. This requirement would appear to be necessary in order to ascertain whether the indirect sources that may be planned for the unit will threaten the attainment or maintenance of the national standards or whether those sources will cause a violation of the PSD or non-attainment area programs.

With EPA possibly promulgating a specific PSD program for the other criteria pollutants in the near future, Forest Service planning should be prepared to deal with those external controls. It seems clear that planning projects which have an adverse impact on air quality, whether to degrade clean air under the PSD regulations or cause vehicular pollutants under the indirect source review program, will be subject to external scrutiny. Thus, it might be preferable for the Forest Service to have laid a strong foundation in its planning documents showing how it considered the air quality impacts of its proposed plan.

The Forest Service must meet some mandated requirements of the PSD program because clearly it falls within the definition of a FLM. One of the problems that has to be confronted initially is what person the Forest Service will want to designate as the FLM. The 1977 Amendments change the definition of FLM from the earlier EPA regulations which defined the FLM to be the head or the designated representative of any agency which administers federally-owned land. Under the early EPA regulations the Chief of the Forest Service was clearly the initially designated FLM under the EPA rules. The statutory definition does not facially authorize delegation of FLM authority from the Secretary of Agriculture to even the Chief of the Forest Service. In fact, the final EPA regulations define the FLM as the Secretary of the department with authority over such land. This would obviously affect the decisionmaking process of the Forest Service land management planning. Clarification of this non-delegating of FLM duties should be sought from the Administrator. In addition, the Forest Service should designate who the "federal official charged with direct responsibility for management of Class I lands" is for the purposes of receiving PSD notices and implementing the affirmative responsibility to protect air quality-related values.²²⁴

The FLM has certain mandatory duties depending on the type or designation of the land under the FLM's jurisdiction. The Secretary of Interior and the appropriate FLM must identify those national wilderness areas over 5,000 acres

(which thus constitute a mandatory Class I area) where visibility is an important value. This review has already taken place. Thereafter, the FLM has no further impact on the visibility protection program until it is implemented by the Administrator. The only role left for the FLM is that the FLM's concurrence is required if the Administrator is to grant a variance or exemption from any rule that is otherwise applicable to major stationary sources to protect visibility in mandatory Class I areas.

The FLM is also given the responsibility to report to Congress within one year of enactment of the 1977 Amendments on reviewing all national monuments, primitive areas, and national preserves and recommend for redesignation to Class I any area where air quality-related values are important attributes of the area. The FLM must also make his report known to the affected state or states and must enter into consultation with the states before making such final recommendation.

The FLM is also given a role in the preconstruction review program which is the heart of the PSD regulatory scheme. FLMs in charge of mandatory Class I areas are charged with direct responsibility for protecting the air quality-related values of such lands. The Forest Service must attempt to define the parameters of "air quality related values." In addition, for all new major stationary sources the FLM can submit a notice and report that the source will have an adverse impact on the Class I lands. The permit to construct cannot then be issued unless the owner or operator demonstrates that the emissions will not cause or contribute to concentrations which exceed the maximum allowable increment for a Class I area.

In addition, if the FLM can convince the state that the emissions from the proposed plant, while not exceeding the maximum allowable increments in the Class I area, will nonetheless have a deleterious effect on air quality-related values, the permit may not be issued. Finally, the FLM is allowed to certify in cases where he has been persuaded by the permit applicant that the existence of the source will not adversely affect use of the Class I area, even though there may be a violation of the maximum allowable increment. This certification will give the state the opportunity to grant the permit.

The FLM also has an advisory role in the variance program whereby for a short-term occurrence there can be violations of the maximum allowable increments for both sulfur dioxide and particulate matter, if the governor approves the variance. The FLM is given notice of the proposed variance and can submit a report to the governor with his recommendations. There is also a duty for FLMs of mandatory Class I areas to concur in the findings of the governor that there will be no adverse air quality-related impacts, including threats to visibility on those lands, by virtue of the variance. Upon disagreement between the FLM and the governor, the appeal is to the Executive Office of the President.

The Forest Service must be aware of its loss of duties regarding air quality decisions over the national forests. States can redesignate to Class III any area other than a national primitive area, national wild and scenic river, or national lakeshore or seashore of over 10,000 acres. The FLM has to be given notice over the proposed redesignation and is allowed to file written comments and recommendations.

The Forest Service also must confront the problem caused by the Act in designating all post-1977 wilderness areas as Class II. Because redesignation to Class I is solely a state decision, the Forest Service must attempt to influence state officials so as to protect the air quality in those areas. If conflicts exist between the integrated plan and the proposed redesignation, the Forest Service must realize that the state will be the final arbiter.

FLMs should be encouraged to involve states in the planning process so that such inconsistencies are avoided. Obviously, alternative land uses and additions to wilderness areas in national forests must be compatible with state intentions on PSD for the area; otherwise an electrical generating plant may be located in close proximity to a national forest which has been planned and managed for maximum recreational or wilderness activity. Again, external factors and players must be considered and utilized in the planning process to avoid useless plans.

NOTES

¹Pub. L. No. 91-604, 84 Stat. 1676 (1970). The 1970 Amendments in reality rewrote much of the earlier federal laws on air pollution, although technically it was only an amendment to the earlier enacted Clean Air Act of 1963.

²Pub. L. No. 95-95, 91 Stat. 685 (1977). The 1977 Amendments recodified the entire statute at 42 U.S.C. §§ 7401-7642 (Supp. II 1978). Hereinafter citations for the Clean Air Act will be to the official source, 42 U.S.C. §§ 7401-7642 (Supp. II 1978).

³In the litigation which created this principle and the ensuing attempt at administrative regulations implementing the principle, several terms have been used interchangeably to describe the basic doctrine. These include the prevention of significant deterioration, no significant deterioration, and non-degradation. See generally Note, The Clean Air Act and the Concept of Non-Degradation, *Sierra Club v. Ruckelshaus*, 2 *ECOLOGY L.Q.* 801 (1972); Hamby, The Clean Air Act and Significant Deterioration of Air Quality: The Continuing Controversy, 5 *ENV. AFF.* 145 (1976). In this paper the principle will be referred to as the prevention of significant deterioration, which is the way the EPA describes it.

⁴42 U.S.C. §§ 7470-91 (Supp. II 1978).

⁵Each air quality control region had to

designate whether it was an attainment or non-attainment area for each of the designated criteria pollutants within 120 days of the passage of the 1977 Amendments. 42 U.S.C. § 7407(d)(1) (Supp. II 1978). The areas designated non-attainment would fall under the non-attainment strategy. 42 U.S.C. §§ 7501-08 (Supp. II 1978).

⁶S. REP. NO. 94-717, 94th Cong., 2d Sess. 21 (1976). The committee reported: "The majority of the land mass of the United States has air quality cleaner than [the secondary] ambient standards." Id.

⁷42 U.S.C. § 7410(a) (Supp. II 1978). The states were given three years from the approval of the SIP by the Administrator to achieve NPAAQS. In most cases NPAAQS would be achieved in mid-1975.

⁸42 U.S.C. § 7410(c)(1) (Supp. II 1978).

⁹40 C.F.R. § 51.12(b) (1978).

¹⁰344 F. Supp. 253, 256 (D.D.C. 1972), aff'd per curiam in an unreported opinion, 4 ERC 1815 (D.C. Cir. 1972), aff'd by an equally divided court, sub nom, Fri v. Sierra Club, 412 U.S. 541 (1973). See generally Note, The Clean Air Act and the Concept of Non-Degradation: Sierra Club v. Ruckelshaus, 2 ECOLOGY L.Q. 801 (1972); Note, Sierra Club v. Ruckelshaus, "On A Clear Day . . .", 4 ECOLOGY L.Q. 739 (1975).

¹¹344 F. Supp. at 256, citing 42 U.S.C. § 7401(b)(1) (Supp. II 1978).

¹²Preliminary Injunction, May 30, 1972, issued by Judge John J. Pratt, reprinted in Hearings on the Nondegradation Policy of the Clean Air Act Before the Subcomm. on Air and Water Pollution of the Senate Comm. on Public Works, 93d Cong., 1st Sess. 5 (1973).

¹³Prevention of Significant Air Quality Deterioration, Proposed Rulemaking, 38 Fed. Reg. 18,985 (1973) [hereinafter cited as Significant Deterioration--First Proposals].

¹⁴Id. at 18,986.

¹⁵See generally Note, Sierra Club v. Ruckelshaus: "On a Clear Day . . .", 4 ECOLOGY L.Q. 739, 743-46 (1975).

¹⁶Significant Deterioration--First Proposals, supra note 13 at 18,990-91.

¹⁷Id. at 18,991-92.

¹⁸Id. In the original proposal the classes were called zones, but later changes utilized the term Class to describe the area in which different levels of degradation were to be allowed.

¹⁹Id. at 18,998-99.

²⁰Id. at 18,999.

²¹Prevention of Significant Air Quality Deterioration, Proposed Rulemaking, 39 Fed. Reg. 31,000 (1974).

²²Id. at 31,004.

²³Id.

²⁴Id.

²⁵40 C.F.R. § 52.21(b)(4), as proposed at, 39 Fed. Reg. 31,007 (1974).

²⁶39 Fed. Reg. 31,007 (1974).

²⁷Id.

²⁸Lands of exclusive federal legislative jurisdiction were defined to mean "Lands over which the federal government has received, by whatever method, all governmental authority of the State, with no reservation made to the State except the right to serve process resulting from activities which occurred off the land involved." 40 C.F.R. § 52.21(b)(5), as proposed at, 39 Fed. Reg. 31,007 (1974).

²⁹Prevention of Significant Air Quality Deterioration, Promulgation, 39 Fed. Reg. 42,510 (1974).

³⁰Id. at 42,511.

³¹Id. at 42,512-13.

³²Id. at 42,515.

³³40 C.F.R. § 52.21(c)(iii), as proposed at, 39 Fed. Reg. 42,515 (1974).

³⁴40 C.F.R. § 52.21(c)(iv), as proposed at, 39 Fed. Reg. 42,515 (1974).

³⁵39 Fed. Reg. 42,515 (1974).

³⁶Id.

³⁷Id.

³⁸40 C.F.R. §§ 52.21(c)(vi)(c)-(e), as proposed at, 39 Fed. Reg. 42,515 (1974).

³⁹Sierra Club v. EPA, 540 F.2d 1114 (D.C. Cir. 1976), vacated and remanded sub nom., Montana Power Co. v. EPA, 434 U.S. 809 (1977) (remanded for further consideration in light of the passage of the 1977 Amendments).

⁴⁰Id. at 1130-31.

⁴¹Id. at 1138.

⁴²Id. at 1139.

⁴³See [1977] 8 Env. Rep. [BNA] 539-40, 608.

⁴⁴U.S. EPA, Review of SO₂ Control Alternatives for Colstrip Units # 3 and # 4 (1978).

⁴⁵Sierra Club v. EPA, 540 F.2d 1114 (D.C. Cir. 1976), vacated and remanded sub nom., Montana Power Co. v. EPA, 434 U.S. 809 (1977).

⁴⁶Id.

⁴⁷Hearings on the Nondegradation Policy of the Clean Air Act before the Subcomm. on Air and Water Pollution of the Senate Comm. on Public Works, 93d Cong., 1st Sess. (1973).

⁴⁸Id. at 6, 13-15 (statement of Lawrence I. Moss, Sierra Club), 74, 76-77 (testimony of Carl Bagge, National Coal Association).

⁴⁹Hearings before the Subcomm. on Environmental Pollution of the Senate Comm. on Public Works. Implementation of the Clean Air Act--1975, 94th Cong., 1st Sess. (1975)[hereinafter 1975 Senate Hearings]; Hearings before the Subcomm. on Health and the Environment of the House Comm. on Interstate and Foreign Commerce--Clean Air Act Amendments--1975, 94th Cong., 1st Sess. (1975); Oversight Hearings before the Subcomm. on Environmental Pollution of the Senate Comm. on Public Works, 93d Cong., 2d Sess. (1974).

⁵⁰1975 Senate Hearings, supra note 49, at 867-70 (statement of C. Howard Hardesty, Continental Oil Co.).

⁵¹Id. at 868-69.

⁵²Id. at 869.

⁵³Id. at 876.

⁵⁴Id. at 902-04.

⁵⁵H.R. 10498, § 108, 94th Cong., 2d Sess. (1976). For a complete discussion of the House bill's PSD provisions see H.R. REP. NO. 94-1175, 94th Cong., 2d Sess. 83-151 (1976) [hereinafter cited as H.R. REP. NO. 94-1175].

⁵⁶H.R. 10498, § 108, 94th Cong., 2d Sess. (1976).

⁵⁷Id.

⁵⁸H.R. REP. NO. 94-1175, supra note 55, at 125-30.

⁵⁹Id. at 127-29.

⁶⁰S. 3219, § 6, 94th Cong., 2d Sess. (1976). For a complete discussion of the Senate bill's PSD provisions, see S. REP. NO. 94-717, 94th Cong., 2d Sess. 19-27 (1976) [hereinafter cited as S. REP. NO. 94-717].

⁶¹S. 3219, § 6, 94th Cong., 2d Sess. (1976).

⁶²Id.

⁶³Id.

⁶⁴Id.

⁶⁵S. REP. NO. 94-717, supra note 60, at 26-27.

⁶⁶S. REP. NO. 94-1742, 94th Cong., 2d Sess. (1976).

⁶⁷Compare Pub. L. No. 95-95, § 127, 91 Stat. 731-45 (1977) with 40 C.F.R. § 52.21 as proposed at 39 Fed. Reg. 42,510-16 (1974). For a complete legislative history of the PSD provisions see H.R. REP. NO. 95-524, 95th Cong., 1st Sess. 103-78 (1977); S. REP. NO. 95-127, 95th Cong., 1st Sess. 27-37 (1977); H.R. REP. NO. 95-564, 95th Cong., 1st Sess. 148-55 (1977).

⁶⁸42 U.S.C. § 7470 (Supp. II (1978)).

⁶⁹Id. at § 7410(a)(1)(E).

⁷⁰Promulgation - Prevention of Significant Air Quality Deterioration, 43 Fed. Reg. 26,380 et seq. (1978), amending, 40 C.F.R. § 51.24 (1978).

⁷¹Id., amending, 40 C.F.R. § 52.21 (1978).

⁷²42 U.S.C. § 7472(a) (Supp. II 1978); 40 C.F.R. § 52.21(e) (1978).

⁷³Id. 40 C.F.R. § 52.21(e) (1978).

⁷⁴Id. at § 7472(b); 40 C.F.R. § 52.21(e)(3) (1978).

⁷⁵Id. at § 7476.

⁷⁶Id. at § 7473(b)(1); 40 C.F.R. § 52.21(c) (1978).

⁷⁷Id. at § 7473(b)(2); 40 C.F.R. § 52.21(c) (1978).

⁷⁸Id. at § 7473(b)(3); 40 C.F.R. § 52.21(c) (1978).

⁷⁹43 Fed. Reg. 26,405, amending, 40 C.F.R. § 52.21(c) (1978).

⁸⁰Id.

⁸¹Id.

⁸²42 U.S.C. § 7473(a) (Supp. II 1978).

⁸³Id. at § 7479(4).

⁸⁴Id. at § 7473(b)(4).

⁸⁵43 Fed. Reg. 26,400, 26,404, amending 40 C.F.R. § 52.21(b)(ii) (1978).

⁸⁶42 U.S.C. § 7474 (Supp. II 1978); 40 C.F.R. § 52.21(g) (1978).

⁸⁷See text accompanying note 69 supra.

⁸⁸42 U.S.C. §§ 7474(a)(1)-(2) (Supp. II 1978).

⁸⁹Id. at § 7474(b)(1)(A). See 40 C.F.R. §§ 52.21(g)(2)(i)-(iii) (1978).

⁹⁰Id. at § 7474(b)(1)(B); 40 C.F.R. § 52.21(g)(2)(ii) (1978).

⁹¹Id.; 40 C.F.R. § 52.21(g)(2)(iv) (1978).

⁹²Id. at § 7602(i); 40 C.F.R. § 52.21(b)(12) (1978).

⁹³Id.; 40 C.F.R. § 52.21(b)(12) (1978).

⁹⁴Id.; 40 C.F.R. § 52.21(g)(2)(v) (1978). Consultation as used in the PSD scheme is a legal term of art, defined in another section of the statute. 42 U.S.C. § 7421 (Supp. II 1978). The consultation process was to have been in operation in August 1978, preceded by EPA regulations defining the parameters of said process. The EPA proposed some guidelines for this consultation process in May 1978 but to date has not finally promulgated any rule. 43 Fed. Reg. 21,468 (1978).

⁹⁵42 U.S.C. § 7474(b)(1)(C) (Supp. II 1978); 40 C.F.R. § 52.21(g)(3) (1978).

⁹⁶Id.; 40 C.F.R. § 52.21(g)(3)(i) (1978).

⁹⁷Id.; 40 C.F.R. § 52.21(g)(3)(iv) (1978).

⁹⁸42 U.S.C. § 7474(b)(2) (Supp. II 1978).

⁹⁹Id. at § 7474(d).

¹⁰⁰Id. In October 1978 it was reported that the Secretary of Interior was going to recommend that about 50 of the 95 national monuments, preserves and primitive areas be redesignated Class I. [1978] 9 Envir. Rep. (BNA) 1170. As of March 1, 1979, this still has not been promulgated.

¹⁰¹42 U.S.C. § 7475 (Supp. II 1978).

¹⁰²Id. at § 7479(1).

¹⁰³Id. at § 7475(a)(1); 40 C.F.R. §§ 52.21(i)-(r) (1978).

¹⁰⁴40 C.F.R. § 52.21(r) (1978).

¹⁰⁵Id. at § 52.21(j).

¹⁰⁶Id. at § 52.21(m).

¹⁰⁷Id. at § 52.21(n).

¹⁰⁸Id. at § 52.21(o).

¹⁰⁹For the Administrator's explanation of the problem, see 43 Fed. Reg. 26,391-94 (1978).

¹¹⁰40 C.F.R. § 52.21(j)(2) (1978). This two-tiered review process is based upon an express congressional exception for 50 ton sources. ⁴² U.S.C. § 7475(b) (Supp. II 1978). Increment consumption will be monitored by the states on a periodic basis to avoid having the increment consumed by these excepted sources. 43 Fed. Reg. 26,393 (1978).

¹¹¹42 U.S.C. § 7475(a)(6) (Supp. II 1978).

¹¹²40 C.F.R. § 52.21(p) (1978).

¹¹³42 U.S.C. § 7475(d)(1) (Supp. II 1978).

¹¹⁴Id. at § 7475(d)(2)(A).

¹¹⁵40 C.F.R. § 52.21(g)(1) (1978).

¹¹⁶42 U.S.C. § 7475(d)(2)(B) (Supp. II 1978); 40 C.F.R. § 52.21(g)(2) (1978). See also S. REP. NO. 95-127, supra note 67, at 35-36, where the committee said:

The Federal land manager, or the supervisor of a class I area, or the Administrator of EPA, or a Governor of an adjacent State with a class I area, is authorized to notify the State that the proposed source poses a potential adverse impact on the quality of the air within the class I area. A statement identifying the potential impacts of the proposed facility would be filed. The bill charges the Federal land manager and the supervisor with a positive role to protect air quality values associated with the land areas under the jurisdiction of the Federal land manager. This means that such officials must seriously consider whether a proposed facility might adversely affect the lands for which they are responsible. If either of them believes there is any risk of such adverse effect, that official should notify the State and initiate the class I analysis. This affirmative responsibility to protect the air quality of Federal lands may involve court challenges for inappropriate permits and facilities constructed without permits, as well as participation in the permit consideration administrative process.

* * *

When notice is filed, the applicant must demonstrate whether or not the class I increments would be exceeded in the class I areas. If they are met, but the Federal land manager, not the supervisor, nevertheless can demonstrate to the satisfaction of the State that the emissions would still have an unacceptable adverse effect on the air quality-related values of the class I

Federal lands, then the State must refuse to issue a permit.

If, on the other hand, the permit applicant demonstrates, to the satisfaction of the Federal land manager, that there would be no unacceptable, adverse impact on the air quality related values of the class I Federal lands, notwithstanding the fact that the class I increments would be exceeded, the State may issue the permit.

Each case of suspected class I intrusion must be analyzed on an individual basis, with the decision on whether or not a permit is issued resting with the State. The Federal land manager holds a powerful tool. He is required to protect Federal lands from deterioration of an established value, even when class I numbers are not exceeded. And whenever they are, he must be satisfied by the applicant that the air quality values of Federal lands will not be impaired, and certify to that effect before the State may issue a permit.

¹¹⁷Id.

¹¹⁸43 Fed. Reg. 26,402 (1978).

¹¹⁹Raffle, The New Clean Air Act--Getting Clean and Staying Clean, 1978 ENV. REP. 17 (BNA) Mono. 26.

¹²⁰43 Fed. Reg. 26,402 (1978).

¹²¹42 U.S.C. § 7475(d)(2)(C)(i) (Supp. II 1978).

¹²²Id. at § 7475(d)(2)(C)(ii).

¹²³Id. at § 7475(d)(2)(C)(iii); 40 C.F.R. § 52.21(g)(4) (1978).

¹²⁴Id. at § 7475(d)(2)(C)(iv); 40 C.F.R. § 52.21(g)(4) (1978).

¹²⁵Id. at § 7475(d)(2)(D)(i); 40 C.F.R. § 52.21(g)(5) (1978).

¹²⁶Id.; 40 C.F.R. § 52.21(g)(5) (1978).

¹²⁷Id. at § 7475(d)(2)(D)(iii); 40 C.F.R. § 52.21(g)(5) (1978).

¹²⁸H.R. REP. NO. 95-564, supra note 67, at 153. See also 123 Cong. Rec. H 5045 (daily ed. May 25, 1977).

¹²⁹42 U.S.C. § 7475(d)(2)(D)(iii) (Supp. II 1978); 40 C.F.R. § 52.21(g)(5) (1978).

¹³⁰40 C.F.R. § 52.21(b)(13) (1978). The figure is identical to that suggested by the House. H.R. REP. NO. 95-564, supra note 67, at 153.

¹³¹42 U.S.C. § 7475(d)(2)(D)(iii) (Supp. II 1978); 40 C.F.R. § 52.21(g)(7) (1978).

¹³²Id.; 40 C.F.R. § 52.21(g)(7) (1978).

¹³³See Penley & Morgan, The Clean Air Act Amendments of 1977: A Selective Legislative

Analysis, 13 LAND & WATER L. REV. 747, 760-61 n.52 (1978).

134⁴² U.S.C. § 7475(d)(2)(D)(ii) (Supp. II 1978); 40 C.F.R. § 52.21(g)(6) (1978).

135^{Id.}; 40 C.F.R. § 52.21(g)(6) (1978).

136^{Id.} at §§ 7475(e)(3)(A)-(D) (Supp. II 1978); 40 C.F.R. § 52.21(m) (1978).

137^{Id.} at § 7475(e)(3)(A).

138⁴⁰ C.F.R. § 52.21(m) (1978).

139⁴² U.S.C. § 7475(c)(3) (Supp. II 1978); 40 C.F.R. § 52.21(m)(2) (1978).

140^{Id.} at § 7620.

141⁶³⁶ F.2d 323 (D.C. Cir. 1979).

142⁴⁵ Fed. Reg. 52,729 (1980).

143⁴² U.S.C. § 6497 (Supp. II 1978).

144^{Id.} at § 7491(a)(1).

145^{Id.} at § 7491(c)(2).

146^{Id.} The Secretary of Interior published his recorded list, and all but two of the mandatory Class I areas were included. 43 Fed. Reg. 7721-28 (1978). The Administrator has published a proposed list that is identical to the Interior list. 44 Fed. Reg. 8908 (1979). It is subject to a 60-day public comment period.

147⁴⁴ Fed. Reg. 69,122 (1979).

148⁴² U.S.C. § 7491(a)(3) (Supp. II 1978). The report must include recommendations on three issues: methods for identifying and measuring visibility impairment, modeling techniques to determine the cause/effect relationship between man-made pollution and visibility impairment, and methods for preventing and remedying such visibility impairment.

149^{Id.} at § 7491(a)(4).

150^{Id.} at § 7491(b).

151^{Id.} at § 7491(c)(3).

152^{Id.} at § 7491(d).

153^{Id.}

154^{Id.} at § 7491(e).

155⁴⁵ Fed. Reg. 80,089 (1980), adding subpart P; 40 C.F.R. § 51.300 et seq. (1978).

156⁴⁰ C.F.R. § 51.301(a) (1980).

157^{Id.} at § 51.301(m).

158^{Id.} at §§ 51.300 et seq.

159^{Id.} at § 51.304.

160^{Id.} at § 51.304(d).

161^{Id.} at § 51.307.

162^{Id.} at § 51.307(a)(3).

163^{Id.} at § 51.307(b)(1).

164^{Id.} at § 51.307(d).

165^{Id.} at § 51.305.

166^{Id.} at § 51.306.

167^{Id.} at § 51.303.

168^{Id.} at § 51.303(h).

169⁴² U.S.C. § 7418 (Supp. II 1978).

170^{Id.}

171^{Compare} Alabama v. Seeber, 502 F.2d 1238 (5th Cir. 1974), with Kentucky ex rel. Hancock v. Ruckelshaus, 426 U.S. 167 (1976).

172⁴²⁶ U.S. 167 (1976).

173^{Id.} at 172.

174^{Id.} at 198-99.

175^{Staff of Senate Comm. on Environment and Public Works, 95th Cong., 1st Sess., A Section-by-Section Analysis of S. 252 and S. 253, Clean Air Act Amendments 18 (Comm. Print 1977).}

176⁴² U.S.C. § 7418 (Supp. II 1978).

177^{Interpretive Ruling, 41 Fed. Reg. 55,524 (1976).}

178^{Pub. L. No. 95-95, § 129(a), 95th Cong., 1st Sess., 91 Stat. 745 (1977).}

179^{Pub. L. No. 95-95, § 129(b), 95th Cong., 1st Sess., 91 Stat. 745 (1977).}

180⁴⁴ Fed. Reg. 3274 et seq. (1979).

181^{Id.} at 3283 (1979).

182^{Pub. L. No. 95-95, § 129(a), 95th Cong., 1st Sess., 91 Stat. 745 (1977).}

183⁴⁴ Fed. Reg. 3276 (1979).

184^{Id.} at 3282-83.

185^{Id.} at 3283.

186^{Id.} at 3277.

187^{Id.} at 3284.

188^{Id.}

189^{Id.}

190^{Id.}

191^{Pub. L. No. 95-95, § 129(a), 95th Cong., 1st Sess., 91 Stat. 745 (1977).}

192⁴⁴ Fed. Reg. 3284 (1979).

193⁴² U.S.C. §§ 7501-07 (Supp. II 1978).

194^{Id.} at § 7502(a)(1).

195^{Id.} at § 7502(a)(2).

196^{Id.} at § 7502(b)(2).

197^{Id.} at § 7502(b)(1).

198^{Id.} at § 7502(b)(3).

199^{Id.} at § 7501(1).

200^{Id.} at § 7502(b)(4).

201^{Id.} at § 7502(b)(6).

202^{Id.} at § 7503.

203^{Id.}

204^{Id.} at § 7502(b)(9).

205^{Id.} at § 7502(b)(10).

206^{Id.} at § 7506.

207^{Id.} at § 7506(c).

208^{Id.}

209^{Id.} at § 7506(d).

210⁶³⁶ F.2d 323 (D.C. Cir. 1979). See also text accompanying note 141 supra.

²¹¹See 45 Fed. Reg. 52,729 (1980), amending, 41 Fed. Reg. 18,382 (1976).

²¹²Pub. L. No. 91-604, § 4, 91st Cong., 2d Sess., 84 Stat. 1680 (1970).

²¹³42 U.S.C. § 7410(a)(5)(C) (Supp. II 1978).

²¹⁴40 C.F.R. § 52.22(b) (1978).

²¹⁵Id. at § 52.22(b)(2)(i).

²¹⁶Id. at § 52.22(b)(2)(ii).

²¹⁷Energy Supply and Environmental Coordination Act of 1974, 15 U.S.C. §§ 797-98 (1976), repealed in part, Clean Air Act Amendments of 1977, Pub. L. No. 95-95, § 112(b)(1), 91 Stat. 789 (1977).

²¹⁸42 U.S.C. § 7410(a)(5)(A) (Supp. II 1978).

²¹⁹The EPA has taken the position that SIPs with indirect source review programs will not be allowed to delete them unless the state can demonstrate that other control strategies that are equally effective in reducing emissions will replace them. [1977] 8 Envir. Rep. (BNA) 1021.

²²⁰42 U.S.C. § 7410(a)(5)(B) (Supp. II 1978).

²²¹Id. at § 7410(a)(5)(C).

²²²Id. at § 7410(a)(5)(D).

²²³H.R. REP. NO. 95-564 supra note 67, at 126.

²²⁴40 C.F.R. § 51.24(p)(2) (1980).

9. Scenic, Cultural and Esthetic*

(a) Coastal Zone

The Coastal Zone Management Act of 1972 (CZMA)¹ was passed by Congress with the primary purpose of encouraging and assisting the coastal states "in preparing and implementing management programs to preserve, protect, develop, and whenever possible restore the coastal zone of the United States."²

Congress has recognized that the coastal zones are heavily burdened by growing populations and increasing industrialization. In 1972, 53% of the population of the United States lived within 50 miles of the coasts of the Atlantic and Pacific Oceans, the Gulf of Mexico, and the Great Lakes. It is estimated that by the year 2000, 80% of the population may live in the same areas.³ Settlement and industrialization of the coastal zones has already caused extensive degradation of highly productive estuaries and marshlands, and the demand for commercial, recreational, and other developments, often at the expense of natural values, will continue to grow and become more intense.

The CZMA makes the states the focal point for developing comprehensive plans and implementing management programs for the coastal zones. It accomplishes this goal by providing the states with grants to develop and implement management programs.⁴ The Department of Commerce has

responsibility for administering the grants,⁵ and the National Oceanic and Atmospheric Administration (NOAA) has published program approval regulations for the states to follow.⁶

The provisions of coastal zone management programs will vary from state to state. Generally, however, state programs must provide for control of land and water uses to protect or preserve fish, shellfish, other living marine resources, wildlife, and nutrient rich areas (particularly estuaries); ecological, cultural, and historic values; and natural and scenic characteristics.⁷ Programs must also prevent permanent and adverse changes to ecological systems, loss of open space for public use, and shoreline erosion.⁸ Specific land uses given for state consideration include, but are not limited to, mineral and sand extraction, recreational facilities, marinas and other boating facilities, government buildings, dams, and highways.⁹ The responsibility lies with a federal agency or license to determine what requirements and prohibitions exist in each state's program since compliance with one state's program is not necessarily compliance with another state's program.

The Forest Service may be affected by the CZMA in three ways. First, and most important, it is bound by the consistency provisions. These require all federal agencies to comply with approved state management programs to the maximum extent practicable, whenever an agency's activity significantly affects the coastal zone of a state.¹⁰ The consistency provisions also prohibit granting a federal license or permit without state approval when the applicant's activity will significantly affect the coastal zone.¹¹ Second, the Forest Service may provide the Secretary of Commerce with its views on proposed state management programs when such programs would affect Forest Service activities.¹² Third, the Forest Service should cooperate with coastal states when national forest system lands are a part of or adjacent to an area proposed by a state for an estuarine sanctuary.¹³

The consistency provisions of the CZMA have the greatest impact on the Forest Service. They have been described as "a unique and highly controversial set of provisions"¹⁴ and have caused the NOAA to adopt a new set of regulations specifically dealing with them.¹⁵ Each provision affecting the Forest Service will be discussed separately.

The most important consistency provision is section 307(c)(1) of the Act which states: "Each federal agency conducting or supporting activities directly affecting the coastal zone of a state shall conduct or support those activities in a manner which is, to the maximum extent practicable, consistent with approved state management programs."¹⁶

* The notes for part 9 begin on p. 100.

The Forest Service is responsible for determining which of its activities significantly affects the coastal zone of a state and must notify the appropriate state agency whenever a significant effect is anticipated.¹⁷ The coastal zone is significantly affected if the activity causes significant:

- (1) Changes in the manner in which land, water, or other coastal zone natural resources are used;
- (2) Limitations on the range of uses of coastal zone natural resources; or
- (3) Changes in the quality of coastal zone natural resources.

In making the determination, the Forest Service should consider the location and magnitude of the activity. There will usually be a significant effect when the activity is large and is adjacent or in close proximity to the coastal zone. The smaller the magnitude of the activity and the further it is from the coastal zone, the less likely it is to cause a significant effect. However, even where the activity is a great distance from the coastal zone, the Forest Service must determine if it significantly affects the coastal zone and notify the appropriate state agency if it does (e.g., upland stream modification significantly affecting the quality of coastal waters).¹⁹ The determination of whether an activity significantly affects the coastal zone is separate from whether the action is consistent with a state program, and the appropriate state agency must be notified when an activity significantly affects the coastal zone even if the effect is beneficial.²⁰

The term "to the maximum extent practicable" means that the Forest Service must comply with a state management program unless it causes a violation of existing law applicable to Forest Service operations.²¹ If the Forest Service determines that compliance with a state program would cause such a violation, the Forest Service must clearly explain the situation to the state agency. It is emphasized that the CZMA was intended to cause substantive changes in the decisionmaking of federal agencies within the context of discretionary powers. Whenever legally permissible, the Forest Service must comply with a state coastal zone management program.²²

The Forest Service is also responsible for determining whether its activities which significantly affect the coastal zone are consistent with the state's management program. A consistency determination is required for all such activities ongoing on the time a state's program is approved by the Secretary of Commerce and for all proposed activities after approval. One general consistency determination can be made for repeated activities, but it must be reviewed periodically.²³ The Secretary of Commerce is authorized to mediate any serious disagreements between a state and

federal agency concerning joint determinations under the Act.²⁴

In 1981 NOAA clarified which federal activities would directly affect the coastal zone within the meaning of section 307(c)(1). The new regulations provide: "The term 'federal activity directly affecting the coastal zone' means that the conduct of the federal activity itself produces a measurable physical alteration in the coastal zone or . . . initiates a chain of events reasonably certain to result in such alteration without further required agency approval."²⁵ "Direct effect" and "direct coastal zone effect" of a federal activity is defined similarly by measurable physical changes.²⁶ The comments to these definitions exclude "promulgation of general long term management plan" for a national forest if the plan does not contain specific actions that would cause a direct effect in a coastal zone.²⁷

The second consistency provision of the CZMA, section 307(c)(2) states: "Any federal agency which shall undertake any development project in the coastal zone of a state shall insure that the project is, to the maximum extent practicable, consistent with approved state management programs."²⁸

As a practical matter, this provision will have little effect on the Forest Service because the NFS is excluded from being classified as part of a state's coastal zone.²⁹ Any development project in a national forest is not "in the coastal zone of a state" and is not subject to this section. However, the Forest Service must comply with section 307(c)(1) consistency requirements if its activity significantly or "directly affects" a state's coastal zone, even though the activity is excluded by definition from the coastal zone because it occurred on NFS land.³⁰

The third consistency provision, section 307(c)(3)(A) states in part: "No license or permit [for an activity affecting a state's coastal zone] shall be granted by the Federal agency until the state or its designated agency has concurred with the applicant's certification [that the activity complies with the state's approval program and that the activity will be conducted in a manner consistent with the program . . .]."³¹

This provision also applies to renewals and major amendments of permits already issued. Whenever a state does not concur with an applicant's certificate, the Forest Service must not issue the license or permit applied for unless the Secretary of Commerce approves on an appeal by the applicant.³²

The actual effects of the consistency provisions are limited in several ways. The first limitation is that the CZMA applies only to coastal states.³³

Another limitation is that a state's coastal zone management program must be approved by the Secretary of Commerce before a federal agency can be affected by it. The same is true for any amendment or refinement a state makes to its program. Any state coastal zone management program, amendment, or refinement which has not been approved by the Secretary of Commerce has no effect on Forest Service activities.³⁴

The Forest Service is affected by other provisions of the CZMA than the consistency provisions. The Forest Service and other federal agencies are authorized to provide the Secretary of Commerce with the agency's views concerning proposed state management programs. The Secretary of Commerce cannot approve a state program without first considering views of other interested agencies.³⁵ The Department of Agriculture is identified specifically in the regulations as an interested agency.³⁶ The importance of this consultation function should not be underestimated. The legislative history of the CZMA states specifically that federal agencies are to be bound strictly by the consistency provisions primarily because those agencies are allowed to participate in the planning process by providing their views to the Secretary of Commerce.³⁷

To obtain approval of a proposed program the state must satisfy several statutory requirements including contacting relevant federal agencies about proposed management programs.³⁸ Federal agencies thus have the opportunity to provide input on the proposed program or to make any objections to its provisions. When a state complies with this and other program requirements,³⁹ it qualifies the management program for federal approval. After the management program is approved, the consistency provisions require federal agencies to comply with the approved state program. Although it is not mandatory that a federal agency respond to contacts made by a state during the program development phase, this is the appropriate time for raising objections to a state's program. The Secretary of Commerce is required to consider comments made by federal agencies, but if no objections are made to provisions of a proposed management program that a federal agency considers unacceptable, the program may be approved as written and be binding on all federal agencies.

Thus, if the Forest Service has an objection to a proposed state management program, it should be diligent in informing the Secretary of Commerce about the objection prior to the program's approval. Once a state program is approved, the Forest Service will be required to comply with it under the consistency provisions. Failure to make objections known prior to approval could result in being bound to a very difficult state program.

The Forest Service is also affected by the regulations which provide that

- (a) Where federally owned lands are a part of or adjacent to the area

proposed [by a state] for designation as an estuarine sanctuary, or where the control of land and water uses on such land is necessary to protect the natural system within the sanctuary, the State should contact the Federal agency maintaining control of the land to request cooperation in providing coordinated management policies. . . .

- (b) Where such use or control of federally owned lands would not conflict with the Federal use of their lands, such cooperation and coordination is encouraged to the maximum extent feasible.⁴⁰

If a state requests cooperation in establishing an estuarine sanctuary in or adjacent to a national forest, the Forest Service should cooperate with the state when that use does not conflict with federal use of the forest.

No penalty is imposed for failure to cooperate in establishing estuarine sanctuaries. Except for the regulations, federal lands are not mentioned in regard to estuarine sanctuaries. The declaration of congressional policy in the CZMA states that federal agencies should cooperate and participate in effectuating the purposes of the Act, but the Act itself does not address the subject of federal lands in conflict with areas desired by the states to be designated as estuarine sanctuaries. Probably for that reason the regulations are not mandatory.

It should be noted that an estuarine sanctuary is a specially selected area set aside for scientific research on the ecological relationships in the estuary. The program is not intended as a broad purpose preservation program to set aside estuaries solely for the purpose of preserving them.

In summary, the CZMA is directed primarily at the states to develop and implement management programs to preserve and enhance the coastal zones of the United States. The Forest Service is affected by the Act in three ways. First, the consistency provisions require the Forest Service to comply with approved state management programs whenever its activity significantly affects the coastal zone of a state. Also, the Forest Service cannot grant a license or permit if the applicant's activity will significantly affect the coastal zone, unless the state has concurred with the applicant's certification that the activity complies with the state's approved program. Second, the Forest Service is given the authority to provide the Secretary of Commerce its views concerning state management programs submitted for approval. Third, the Forest Service also is authorized to cooperate to the maximum extent feasible with coastal states when NFS lands are a part of or adjacent to an area proposed by a state

for designation as an estuarine sanctuary. Although the actual effects of the CZMA upon the Forest Service are limited by geographical factors, in those areas where the Act does apply, Congress has emphasized that federal agencies "have a duty and responsibility to cooperate and participate in accomplishing the purposes of the Act."⁴² The Forest Service should develop procedures and guidelines for working with coastal states and NOAA to fulfill these obligations in applicable areas.

(b) Historic Preservation

Scenic, cultural, and historic values must be recognized and considered in the planning process. These values are recognized specifically in the Antiquities Act;⁴³ the Historic Sites, Buildings, and Antiquities Act;⁴⁴ the National Historic Preservation Act of 1966;⁴⁵ and the Archaeological Resources Protection Act of 1978.⁴⁶ They also are recognized indirectly through federal statutes, such as NEPA which requires federal agencies to avoid harming areas of historic, cultural, scenic, and archaeological significance.

Preservation and protection of historic and cultural values must begin early in the planning process. Under NEPA it is necessary to determine with respect to a proposed action whether areas or objects of archaeological, historic, or cultural significance will be adversely affected by the proposed project. In the first instance an agency may have to conduct special monitoring, investigations, studies, identification, and discovery work by archaeologists, historians, or other persons trained to determine the existence and extent of protected sites. It also requires determining whether any declared national monuments, landmarks, or historic sites have been proposed or proclaimed under pertinent federal statutes. If so, they too must be protected.

The importance of an area of cultural, historic, or archaeological significance being potentially within the federal preservation program is that special efforts to maintain it must be taken by agencies. In a recent case, for example, the Department of Transportation (DOT) proposed an interstate highway in Hawaii that would destroy a valley traditionally viewed as the home of the native gods.⁴⁷ The court ruled that the area was suitable for inclusion in the National Register, and until a determination was made whether to include it, the Department of Transportation could not build the highway and destroy the area and archaeological finds. According to the court, being included or eligible for inclusion in the National Register requires special efforts at preservation. The "eligible for inclusion" designation qualified the valley as an area of national or "local significance" within the meaning of section 4(f) of the Department of Transportation Act.⁴⁸ Section 4(f) in turn imposes additional obligations on DOT to make specific findings that no feasible and prudent alternative route exists

and to apply maximum mitigation and preservation efforts. Because the section 4(f) duties had not been met, the highway could not be built. The court also noted that the NEPA EIS on the proposed highway was inadequate because it did not evidence compliance with section 4(f) and the historic preservation statutes.⁴⁹

In Cappaert v. United States⁵⁰ the importance of national monuments was presented in a water law case. The United States sought to enjoin the plaintiff from withdrawing groundwater that would lower the water level in Devil's Hole, a national monument. Lowering the water table threatened the existence of the Devil's Hole pupfish, a rare species. The United States Supreme Court concluded that the water level must be maintained. In setting aside the area as a national monument, the Court concluded the government had also reserved water necessary to carry out the purpose of the reservation. Since the purpose was historic and archaeological preservation, and the proclamation specifically identified studies of the pupfish as one of its objectives, the water must be maintained as a level sufficient to protect the existence of the species.

Another use of the Antiquities Act affecting significant parts of Forest Service land occurred in December 1978. Under the Antiquities Act of 1906 President Carter withdrew from exploration and development of resources many acres of Alaskan land.⁵¹ By presidential proclamation the areas were identified as significant for their historic value with respect to use by native Americans and for development as wildlife preserves. The proclamations set the land aside from any development and prohibited use of them that would threaten their preservation for historic, scenic, and recreational purposes. This effectively precluded any development of the land for minerals that would have otherwise occurred by the failure of Congress in 1978 to adopt a new Alaskan public lands law. Once a state or area has been declared a national monument, the statutory and administrative regulations limit their use and the use of the lands on which they are located.

Prior to the President's action under the Antiquities Act, the State of Alaska sued in Alaska v. Carter⁵² to require the Interior Department and the President to prepare an EIS before making any classification or determination concerning the use of the federal lands in Alaska. This, of course, effectively would deny protection to the lands. The court in that case concluded that the President's action under the Antiquities Act was not subject to the limitations of NEPA. The court expressly held that Presidential action is not agency action under NEPA. Moreover, the court concluded that the Secretary of Interior's withdrawal actions under FLPMA⁵³ were not subject to NEPA. The court determined that the FLPMA requirement for immediate withdrawal of lands in extenuating circumstances

could not be satisfied if a NEPA EIS were required. Hence the withdrawal action fell within the exception to the NEPA mandate as an express statutory obligation that is incompatible with the requirements of NEPA. Thus, prior to enactment of the Alaskan lands legislation,⁵⁴ those lands were withdrawn and preserved from development under both the Antiquities Act and FLPMA.

The federal agencies must also cooperate with the Department of Interior in determining possible sites and areas for inclusion in the National Historic Preservation System by being placed in the National Register. The agency must develop affirmative procedures to determine which sites or areas are suitable for preservation for cultural, archaeological, or historic purposes. This information must be given to the Interior Department for its consideration and appropriate action.

The most recent and perhaps most important historic preservation law affecting functions of the Forest Service is the Archaeological Resources Protection Act of 1979.⁵⁵ That Act establishes a permit system for the excavation or removal of historic resources or sites on public lands. Public lands are defined to include NFS lands.

The Act and permit system is conducted by the FLM. The FLM under the Act is the Secretary of the department or head of the agency having primary management authority for the lands. With respect to NFS lands, that official is probably the Chief of the Forest Service.

The permit system is implemented through uniform regulations that are developed by the Secretaries of Interior, Agriculture, and Defense, and the Chairman of the Board of the TVA.⁵⁷ These regulations must include a permit requirement for an excavation and removal permit. They are to be developed in consultation with the FLMs, Indian tribes, and concerned individuals who are responsible for carrying out the Act.

Under the Act FLMs must require a permit before allowing any excavation or removal of archaeological resources or sites from public lands.⁵⁸ The permit application must include the information required under the uniform regulations. The FLM must notify the affected Indian tribe of any harm to or destruction to religious or cultural sites that may result from issuance of a permit.

The FLM is also responsible for issuing regulations to implement the uniform regulations on public lands under the FLM's jurisdiction.⁵⁹ In addition, the FLM may enforce the Act through assessment of civil penalties for violations. Any penalty must be preceded by an opportunity for a notice and hearing. Any permit under the 1979 Act supersedes any permit required by the Antiquities Act of 1906. Similarly, a previously issued permit under the 1906 Act remains in effect and the permitted activity does not require a permit under the 1979 Act. However, permits under

the 1906 Act must be consistent with the ones issued under the 1979 Act.

The FLM has the authority to issue a permit for excavation or removal of resources from public lands after making certain findings.⁶⁰ First, the FLM has to determine that the applicant is qualified to carry out the permitted activity. Second, the activity must be done to further archaeological resources knowledge in the public interest. In addition, any archaeological resources discovered will have to remain the property of the United States. Moreover, the resources or copies of them have to be preserved by a suitable scientific or educational institution. Lastly, the FLM has to determine that the permitted activity is not inconsistent with any management plan applicable to the lands.

(c) Noise

The Noise Control Act of 1972⁶¹ was passed as a result of the growing concern over noise pollution. The major emphasis of both the Senate Report⁶² and the Act itself is on the need for control and abatement of noise to prevent its adverse physiological and psychological effects on humans in urban areas. Even though Congress was concerned with the health and welfare of humans, several references in both the Senate Report and in the Act indicate that property and living systems other than humans were also considered in enacting the legislation.⁶³ The Act authorized the Administrator of the EPA to conduct and fund research on effects, measurement, and control of noise with respect to wildlife and property.⁶⁴ The Act also involves Forest Service participation through its definition of "person" as including federal agencies and departments such as the Department of Agriculture and the Forest Service under it. These references in the Act indicate that activities of the Forest Service are within the scope of the Act, and therefore the Forest Service must comply with the requirements and guidelines of the Act in carrying out its delegated responsibilities.

Because Congress believed that the optimal method of reducing levels of environmental noise was the control of noise at the manufacturing stage of a product, much of the Act is concerned with the identification of major sources of noise and promulgation of noise emission standards to be complied with by manufacturers of such products. Although the Act does not specifically mandate any planning on the part of the Forest Service, it states that all federal agencies must comply with any applicable provisions.⁶⁵

This requirement of the Act is supported by Executive Order 12088 which requires all federal facilities to comply with all environmental legislation.⁶⁶ The Order requires all federal agencies to comply with all procedural and substantive pollution control standards established

by various statutes.⁶⁷ Included in the listed environmental legislation is the Noise Control Act of 1972.⁶⁸

Pursuant to the Act itself and to the mandate of Executive Order 12088 several provisions of the Act must be considered by the Forest Service in planning its activities. The Forest Service must comply with state and local noise emission regulations, as well as with those regulations promulgated by the Administrator of the EPA (Administrator). The Forest Service must consult with the Administrator in initiating regulations and programs regarding the control of noise. Finally, the Forest Service must be aware of the prohibited acts affecting the use of products identified as major sources of noise.

The Act also contains provisions that allow discretion on the part of the Forest Service which, nevertheless, are important to its management activities. A major provision of the Act having relevance to the activities of the Forest Service is the authority delegated to state and local governments to continue their control of noise pollution. The Senate Committee distinguished between the requirements of the Act which pertained to manufacturers, to be formulated by the federal government, and the requirements on the users of the products which the states and local governments had the responsibility to regulate.⁶⁹ In its explanation of the need for noise legislation, Congress stressed that the primary responsibility for the control of noise rested with the states and that its intention was to provide uniform guidelines for the control of noise in commerce.⁷⁰

The only regulations preempted by the Noise Control Act were those pertaining to noise emission requirements at the production stage. Federal agencies are required to comply with federal, state, and local requirements respecting the control and abatement of environmental noise to the extent that any person is subject to such requirements.⁷¹ The Act also provided that the states "may establish and impose controls of environmental noise . . . through licensing, regulation, or restriction of the use, operation, or movement of any product or combination of products."⁷² These two provisions of the Act bind federal agencies to state and local procedural requirements regarding environmental noise.

These provisions of the Act mandating compliance with state and local procedural regulations of noise control are important to the Forest Service in its planning process and should be recognized because of the impact they may have on Forest Service projects and activities. Those regulations may affect Forest Service construction projects, forest maintenance (timber cutting and reforestation), and recreation projects undertaken by the Forest Service for public use. Any activity of the Forest Service which involves the use of a product identified by Congress as being a major source of noise, such as construction equipment, transportation equipment (including recrea-

tional vehicles and related equipment), any motor or engine (including any equipment of which an engine or motor is an integral part), and electrical or electronic equipment is subject to the provisions of this Act and any applicable state or local noise emission regulations.⁷³ For this reason the Forest Service must be aware of these rules and regulations during the planning stage of certain projects so that the projects will not be later frustrated by noncompliance with such state and local regulations.

Also, after consultation with the appropriate federal agencies, the Administrator will publish reports of permissible levels of noise in defined areas and under various conditions.⁷⁴ As with state and local regulations, the Forest Service should be aware of these permissible levels so that any projects planned by the Forest Service will conform to such requirements.

The Forest Service is not subject to the criminal sanctions imposed for violations of the Act.⁷⁵ However, any person may initiate civil proceedings against any "governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution,"⁷⁶ sixty days after notice of the alleged violation has been given to the Forest Service.⁷⁷ The proceedings will be conducted in federal district courts which have the jurisdiction to enjoin the Forest Service from continuing the alleged violation.⁷⁸

The Forest Service should be aware that the Act requires that all federal agencies consult with the Administrator in prescribing standards or regulations respecting noise.⁷⁹ Although this requirement does not affect the authority of the Forest Service to make rules regarding safety in the national forests (loud and disorderly conduct, shooting fireworks, firing guns in or near campsites), this provision of the Act could have relevance to programs of the Forest Service directed toward reducing the level of noise in national forests.

The only prohibited act which would affect Forest Service activities is the "removal or rendering inoperative, except for maintenance or repair or replacement, any device or element of design incorporated into any product in compliance with the regulations for noise emission for that product while it is in use."⁸⁰ Also the Forest Service cannot use a product after such a device has been removed or rendered inoperative by any person.⁸¹

Several provisions of the Noise Control Act of 1972 should be recognized by the Forest Service as having an indirect impact on its activities. Although the provisions are discretionary in nature, they are such that participation in certain proceedings may be beneficial to the Forest Service. The Administrator is responsible for identifying products as major sources of noise,⁸² and formulating noise emission standards

for products distributed in commerce.⁸³ The Forest Service should be aware of these publications and their effect upon Forest Service activities, since the Forest Service may participate in the rulemaking process for standards for such products.

Another provision of the Act important to the Forest Service is the certification of low noise emission products.⁸⁴ The Administrator will certify any product as a low noise emission product, which may be suitable as a substitute for a product in use by the federal agencies. After this certification process, the Administrator of the General Service will purchase that product for use by the government and determining that the cost of such product is not more than 125% of the retail price of the least expensive product for which there are certified substitutes.⁸⁵

The Act calls for public participation in the certification process in support of or in opposition to the product under consideration.⁸⁶ The product, if certified, will be purchased for use by the Forest Service rather than the product for which it was substituted. Although the product may be considered a suitable substitute by the Administrator, it may not serve the same purpose as the product previously used by the Forest Service. For this reason, the Forest Service may find it advantageous to participate in the certification proceedings, to show why the product is not a suitable substitute for the one presently in use.

The Noise Control Act of 1972 deals mainly with noise control and abatement so that its adverse effects do not jeopardize the health and welfare of humans. For this reason only selected provisions of the Act are applicable to the Forest Service. However, those applicable provisions that require compliance by the Forest Service must be considered. In addition, the Forest Service should be aware of the discretionary provisions of the Act in order that the management of the forest system be more efficient with respect to noise control.

NOTES

¹16 U.S.C. §§ 1451-64 (1976), as amended by, Coastal Zone Management Act Amendments of 1976, Pub. L. No. 94-370.

²S. REP. NO. 753, 92d Cong., 2d Sess. 1, reprinted in [1972] U.S. CODE CONG. & AD. NEWS 4776.

³S. REP. NO. 753, 92d Cong., 2d Sess. 2, reprinted in [1972] U.S. CODE CONG. & AD. NEWS 4776, 4777.

⁴16 U.S.C. § 1454 (1976); see also 43 Fed. Reg. 8377, 8429 (1978) (to be codified in 15 C.F.R. §§ 923.90-.102).

⁵See 16 U.S.C. §§ 1453(15), 1454 (1976).

⁶Coastal Zone Management Program Approval Regulations, 43 Fed. Reg. 8377 (1978) (to be codified in 15 C.F.R. § 923).

⁷See 16 U.S.C. §§ 1455(c)-(g) (1976); 43 Fed. Reg. 8377, 8395-97 (1978) (to be codified in 15 C.F.R. §§ 923.1(c)(1)-(2)).

⁸See 43 Fed. Reg. 8377, 8395-97 (1978) (to be codified in 15 C.F.R. §§ 923.1(c)(1)-(2); 16 U.S.C. § 1454(b) (1976).

⁹43 Fed. Reg. 8377, 8398 (1978) (to be codified in 15 C.F.R. § 923.11(c)).

¹⁰16 U.S.C. §§ 1456(c)(1)-(3) (1976). The actual language of the Act uses the term "directly affecting the coastal zone of a state." Id. The NOAA adopted the term "significantly affecting" for use in its regulations. Federal Consistency with Approved Coastal Management Programs, 43 Fed. Reg. 10509, 10511, 10518, 10519 (1978) (to be codified in 15 C.F.R. §§ 930.21, 930.30).

¹¹16 U.S.C. § 1456(c)(3)(A) (1976). The actual language of the Act states that when an applicant's activity "affects" the coastal zone of a state, the requirements of the section must be met. Id. The NOAA used the term "significantly affects" in its regulations. 43 Fed. Reg. 10509, 10511, 10523 (1978) (to be codified in 15 C.F.R. § 930.50).

¹²See 16 U.S.C. §§ 1456(a)-(b) (1976). Approval of a program by the Secretary of Commerce must be preceded by consultation with and consideration of comments from interested federal agencies.

¹³15 C.F.R. § 921.13 (1977).

¹⁴43 Fed. Reg. 10509, 10510 (1978).

¹⁵Federal Consistency with Approved Coastal Management Programs, 43 Fed. Reg. 10509 (1978) (to be codified in 15 C.F.R. § 930).

¹⁶16 U.S.C. § 1456(c)(1) (1978). See note 9 *supra*.

¹⁷43 Fed. Reg. 10509, 10520 (1978) (to be codified in 15 C.F.R. §§ 930.33-.34).

¹⁸Id. at 10519 (to be codified in 15 C.F.R. §§ 930.21(b)(1)-(3)).

¹⁹Id. at 10520 (to be codified in 15 C.F.R. § 930.33(c)).

²⁰Id. at 10519 (to be codified in 15 C.F.R. § 930.21(b)).

²¹Id. at 10519-20 (to be codified in 15 C.F.R. § 930.32(a)).

²²Id.

²³Id. at 10521-22 (to be codified in 15 C.F.R. §§ 930.37-.38)).

²⁴16 U.S.C. § 1456(h) (1976); 43 Fed. Reg. 10509, 10530-31 (to be codified in 15 C.F.R. §§ 93.110-.116).

²⁵46 Fed. Reg. 26658, 26659 (to be codified at 15 C.F.R. §§ 930.33 & .34).

26 *Id.* at 26660 (15 C.F.R. § 930.33 (1980)).
 27 *Id.*
 28 16 U.S.C. § 1456(c)(2) (1976).
 29 *Id.* at § 1453(1) (1976); 42 Fed. Reg. 22035, 22042 (1977) (to be codified in 15 C.F.R. § 920.11(b)(1)(iii)).
 30 42 Fed. Reg. 22035, 22042 (1977) (to be codified in 15 C.F.R. § 920.11(b)(1)(iii)).
 31 16 U.S.C. § 1456(c)(3)(A) (1976). See note 10 *supra*.
 32 *Id.*; 43 Fed. Reg. 10509, 10526 (1978) (to be codified in 15 C.F.R. § 930.65).
 33 See 16 U.S.C. §§ 1453(1) & (3) (1976); 15 C.F.R. § 926.2(c) (1977).
 34 16 U.S.C. §§ 1456(1)-(2), (3)(A) (1976); 43 Fed. Reg. 10509, 10511, 10518 (1978) (to be codified in 15 C.F.R. § 930.19); *id.* at 8427 (to be codified in 15 C.F.R. § 923.80(d)).
 35 16 U.S.C. §§ 1456(a)-(b) (1976).
 36 43 Fed. Reg. 8377, 8396 (1978) (to be codified in 15 C.F.R. § 923.2(d)).
 37 S. REP. NO. 753, 92d Cong., 2d Sess. 18, reprinted in [1972] U.S. CODE CONG. & AD. NEWS 4776, 4793.
 38 16 U.S.C. § 1455(c)(1) (1976).
 39 *Id.* at §§ 1455(c)-(e).
 40 15 C.F.R. § 921.13 (1977).
 41 *Id.*
 42 S. REP. NO. 753, 92d Cong., 2d Sess. 8, reprinted in [1972] U.S. CODE CONG. & AD. NEWS 4776, 4783.
 43 16 U.S.C. §§ 431-33 (1976).
 44 *Id.* at §§ 461-67.
 45 *Id.* at §§ 470-470t.
 46 42 U.S.C. §§ 470aa-470ll (Supp. III 1979).
 47 *Stop H-3 Ass'n v. Coleman*, 533 F.2d 434 (9th Cir. 1976).
 48 49 U.S.C. § 1653(f) (1976).
 49 *Stop H-3 Ass'n v. Coleman*, 533 F.2d 434 (9th Cir. 1976).
 50 426 U.S. 128 (1976).
 51 Presidential Proclamation Nos. 4611-27, "Alaskan National Monuments," 43 Fed. Reg. 57009-57132 (Dec. 1, 1978).
 52 426 F. Supp. 1155, 12 ERC 1486 (D. Alaska 1978).
 53 The emergency withdrawal was done pursuant to section 204(b) of FLPMA, 43 U.S.C. § 1714(b) (1976).
 54 See part II, 10 *infra*, this page.
 55 16 U.S.C. §§ 470aa-470ll (Supp. III 1979).
 56 *Id.* at § 470cc. See *id.* § 470bb(2) for definition of federal land manager.
 57 *Id.* at § 470ii(a).
 58 *Id.* at § 470cc.

59 *Id.* at § 470ii(b). See *id.* §§ 470ee & 470ff for penalties.
 60 *Id.* at § 470cc(b).
 61 42 U.S.C. §§ 4901-18 (1976).
 62 S. REP. NO. 92-1160, 92d Cong., 2d Sess. (1972).
 63 *Id.* at 2-4.
 64 42 U.S.C. § 4913(1)(A) (1976).
 65 *Id.* at § 4903(a).
 66 Exec. Order No. 12,088, 43 Fed. Reg. 47707 (1978).
 67 *Id.*, § 1-101.
 68 *Id.*, § 1-102(e).
 69 S. REP. NO. 92-1160, 92d Cong., 2d Sess. 8-10 (1972).
 70 42 U.S.C. § 4901(a)(3) (1976).
 71 *Id.* at § 4903(b).
 72 *Id.* at § 4905(c)(2).
 73 *Id.* at §§ 4905(a)(1)(C)(i)-(iv).
 74 *Id.* at § 4904.
 75 *Id.* at § 4911(a)(1)(B).
 76 *Id.*
 77 *Id.* at § 4909(b)(1)(A)(ii).
 78 *Id.* at § 4911(a).
 79 *Id.* at § 4903(c)(2).
 80 *Id.* at § 4909(a)(2)(A).
 81 *Id.* at § 4909(a)(2)(B).
 82 *Id.* at § 4904(b).
 83 *Id.* at § 4905.
 84 *Id.* at § 4914.
 85 *Id.* at § 4914(c)(1).
 86 *Id.* at § 4914(b)(5)(E).

10. Alaska Lands*

On December 2, 1980, the President signed the Alaska National Interest Lands Conservation Act.¹ A stated congressional objective was to preserve the scenic, cultural, archaeological, historic, and related conservation values for the benefit of present and future generations. The Act also was intended to be the last action by Congress to examine and set aside public lands in Alaska for conservation or other purposes. The Act settled the conflicting land claims by the State of Alaska under the Statehood Act and other federal laws, and by Native Americans under the Alaska Native Claims Settlement Act.

The major provisions of this Act affecting the Forest Service include those expanding existing national forests, creating new national monuments within national forests, and creating new wilderness areas and wilderness study areas

* The notes for part 10 begin on p. 105.

in national forests. The Act also contained provisions for regulating timber and mining activities, and for protecting fish and wildlife and fisheries on NFS lands. In addition, the Act has special provisions concerning judicial review of administrative actions implementing it, including preparation and review of environmental impact statements. It also makes the RARE II study final with respect to Alaska lands.

Under the Act the Chugach and Tongass National Forests were expanded by adding the units included in the October 1978 proposed additions.² Subject to valid existing rights, these additions are to be administered according to the general rules governing NFS lands and provisions of this Act. The Act establishes the conservation of fish and wildlife and their habitats as the primary management purpose of the Copper/Rude River addition and the Copper River/Bering River portion of the Chugach National Forest. The Secretary of Agriculture is required to issue special regulations for those areas. Those regulations must allow multiple use activities and the taking of fish and wildlife in a manner consistent with the conservation objectives.³

The Act withdraws from location, entry, and patent under the general mining laws the minerals in the public lands in the Copper River addition to the Chugach National Forest.⁴ This withdrawal does not affect existing rights. Moreover, the Secretary may permit the removal of nonleasable minerals pursuant to reasonable regulations under the Reorganization Plan No. 3 of 1946 and the Weeks Act (16 U.S.C. § 520). The Secretary also may allow mineral leasing under the mineral leasing laws if the activity would not have any significant adverse effects on the administration of the area.

The Act created two national monuments, the Admiralty Island and Misty Fjords, within the Tongass National Forest.⁵ These are subject to management under the rules governing NFS lands. They are to be managed principally to preserve their ecological, cultural, geological, historical, prehistorical, and scientific values. The Secretary cannot allow any timber harvest sales in the monument areas.⁶ The lands, subject to valid existing rights, are withdrawn from all forms of entry, appropriation, or disposal under public lands laws, including location, entry, and patent under the general mining laws.⁷ Any holder of an existing valid mining claim on public lands within the monument areas has the right to continue necessary activities under the claim according to reasonable regulations issued by the Secretary.

The Act contains special provisions concerning the development of a molybdenum mine in the Quartz Hill of the Tongass National Forest.⁸ The Secretary may issue a special use permit for a surface access road for bulk sampling of the mineral deposit at Quartz Hill. That permit must be preceded by a mining development analysis document prepared by the Secretary in consultation with the Secre-

taries of Commerce and Interior and the State of Alaska.⁹ The draft of the document must be prepared within six months of the Act and be made available for public comment. The analysis must be completed nine months after the Act, and its results must be made public.

The analysis must contain detailed discussion of at least,

- (A) the concepts which are under consideration for mine development; (B) the general foreseeable potential environmental impacts of each mine development concept and the studies which are likely to be needed to evaluate and otherwise address those impacts; and (C) the likely surface access needs and routes for each mine development concept.¹⁰

In addition, the Secretary must prepare an environmental impact statement on the access road for bulk sampling purposes and the bulk sampling phase proposed by United States Borax and Chemical Corporation in the Quartz Hill area.¹¹ A draft EIS must be completed by December 2, 1981. The EIS must include evaluation of alternative surface access routes to minimize the impact on fisheries; evaluation of impacts on fish, wildlife, and their habitats and ways to minimize the harmful impacts and further positive ones; evaluation of the extent and likelihood of alternatives being used to the mine development road;

plans to evaluate the water quality and quantity, fishery habitat, and other fishery values of the affected area, and to evaluate, to the maximum extent feasible and relevant, the sensitivity to environmental degradation from activities carried out under a plan of operations of the fishery habitat as it affects the various life stages of anadromous fish and other foodfish and their major food chain components.¹²

Within four months after the final EIS is issued, the Secretary must complete any administrative review of the proposal in the EIS and issue a special use permit to the applicant for the surface access road. The permit may be denied only if the Secretary determines "that construction or use of such a road would cause an unreasonable risk of significant irreparable damage to the habitats of viable populations of fish management indicator species and the continued productivity of such habitats."¹³ If the applicant seeks judicial review of a denial of the permit, the Secretary has the burden of proving that the denial was justified.¹⁴ The special use permit cannot be issued before the full field season of work for gathering baseline data during 1981 has ended.

In addition to the burden of proof provision, the judicial review under this section is

expedited.¹⁵ Any review sought of any administrative action, including the EIS, under this section is to be set for hearing at the earliest possible date and must be expedited by the court in every feasible way. The final decision must be made within 120 days, unless more time is needed to comply with constitutional requirements.

The Act also requires the Secretary to issue a use permit for limited areas of the Misty Fjords Monument Wilderness to the United States Borax and Chemical Corporation.¹⁶ The permit must allow activities including navigational aids and the installation, maintenance, and use of docking, staging, and transfer facilities necessary for the mineral development at Quartz Hill.

Under the Act holders of valid mineral claims in the mineral deposits at Quartz Hill and Greens Creek in the Tongass National Forest may obtain leases at fair market value of land and associated permits for mining or milling purposes at the claim sites.¹⁷ The leases must be preceded by the Secretary finding that the milling activities are necessary to develop the claims and are not otherwise available on land held by the claimant. In addition, it must be determined that the lease will not cause irreparable harm to the Misty Fjords or the Admiralty Island National Monuments.

The last determination is that the use of the leased land will cause the least environmental harm of any reasonably available alternative location. Any lease so issued may be subject to any conditions and terms the Secretary deems necessary. The lease will terminate when the mineral deposit is exhausted or on nonuse of the leased site for two consecutive years.

Special provisions are included in the Act for unperfected mining claims in the Misty Fjords and Admiralty Island National Monuments. The Act allows holders of unperfected mining claims to receive exploration permits and patents upon finding mineral deposits.¹⁸ To obtain an exploration permit, the holder must file an application before September 2, 1981. The unperfected claim must be within three quarters of a mile of the exterior boundary of a core claim owned or inherited by the applicant as of May 1, 1979. Lastly, the core claim and unperfected claim must be located, recorded, and maintained to the extent required by law on the date the Secretary makes these determinations on the application. The exploration permit ends on December 2, 1986, or a date thereafter allowing additional time if the Secretary fails to issue the permit within the 18 month period for reasons beyond the control of the applicant (including administrative and judicial proceedings).

The exploration permit application has to have the applicant's name, address, and telephone number; the name of the claim, date of its location, date of its recordation; and its serial number under the Federal Land Policy and Management Act of 1976.¹⁹ The application also must show

evidence of satisfying the location, filing, and other requirements of the Act. The Secretary must issue an exploration permit within 18 months of an application if the requirements of the Act are met.

Under the Act the exploration permit is void upon its expiration unless a valid mineral discovery is made. If the permit holder makes a valid mineral discovery and reports it to the Secretary before the permit expires, and if the discovery is verified, the holder is entitled to a patent to the minerals in the claim under the general mining laws.²¹ The holder also is entitled to such use of the surface as is necessary for mining and milling purposes. Those uses are subject to reasonable regulations prescribed by the Secretary for mining and milling activities on NFS lands generally.

Leases of NFS lands for mining and milling purposes necessary to develop minerals from valid mining claims within the Misty Fjords or Admiralty Island National Monuments are permitted at fair market value.²² The lease must be preceded by a finding that the use of the site leased will not cause irreparable harm to the monument and that use of the leased site will cause less environmental harm than use of other reasonably available sites. The lease may be subject to whatever reasonable terms and conditions the Secretary deems necessary. These leases end when the mineral deposit is exhausted or the leased site is not used for two consecutive years.

Under the Act fisheries on NFS lands receive extra protection.²³ The Alaska National Interest Lands Conservation Act requires the Secretary to manage the land surface resources in a manner providing maximum protection to anadromous fish, other foodfish, and their habitats. The Secretary must issue "reasonable regulations as he determines necessary . . . to maintain the habitats, to the maximum extent feasible, of anadromous fish and other foodfish, and to maintain the present and continued productivity of such habitat when such habitats are affected by mining activities on national forest lands in Alaska."²⁴ In addition, with respect to the anticipated large scale mining operations in the Quartz Hill area of the Tongass National Forest, the regulations must require that the work be done pursuant to an approved plan of operations.²⁵ The plan can only be approved by the Secretary after consultation with the Secretaries of Commerce and Interior and the State of Alaska. The Secretary must determine that the plan is based on adequate data to evaluate the fishery values of the affected area and the potential environmental degradation to fishery habitats from the plan's activities. The plan must identify the risks and the benefits of the activities to the stability and productivity of anadromous and other foodfish, fishery habitat, and other fishery values. The operating plan also must include adequate

provisions to prevent significant adverse environmental impacts to the fishery habitat and other fishery values and to maintain the productivity of the habitat of anadromous fish and other foodfish that may be threatened by the mining operations.

The Secretary has to determine that the proposed activities will not interfere with the gathering of baseline data needed to evaluate the effect of the operations under the plan on fishery habitats or their productivity.²⁶ The plan and mining activities must be reviewed at least annually by the Secretary. If the review reveals harmful effects on fishery habitats or their continued productivity, the Secretary has to require that the plan be modified to eliminate or mitigate the harmful effects.²⁷ Lastly,

upon a finding by the Secretary that a mining activity conducted as a part of a mining operation exists which constitutes a threat of irreparable harm to anadromous fish, or other foodfish populations or their habitat, and that immediate correction is required to prevent such harm, he may require such activity to be suspended for not to exceed seven days, provided the activity may be resumed at the end of said seven-day period unless otherwise required by a United States district court.²⁸

Except for the last provision, the plan approval does not enlarge or change the authority of the Secretary concerning the management of NFS lands.²⁹

The Alaska National Interest Lands Conservation Act also amended the Wilderness Act of 1964 by adding new areas and establishing study areas in NFS lands in Alaska.³⁰ The new areas were established in the Tongass National Forest and were based on the proposed wilderness areas previously designated by maps dated October 1978, January 1979, and July 1980. The Act designated the Nellie Juan-College Fiord, Chugach National Forest, as a wilderness study area. The Secretary must report his findings on its suitability or non-suitability for wilderness designation within three years.

Under the Act Congress also established the National Forest Timber Utilization Program.³¹ Under the program the Secretary of Agriculture has available annually at least \$40 million or whatever amount is "necessary to maintain the timber supply from the Tongass National Forest to dependent industry at a rate of four billion five hundred million foot board measure per decade."³² The funding is to come from the receipts the Secretary gets from oil, gas, coal, timber, and other natural resources. The Secretary is to use the funds to provide insured or guaranteed loans to purchasers of national forest materials in Alaska to help them buy equipment and implement new technology that leads to new uses of wood products. The Secretary must promulgate regulations setting eligibility requirements for loans under the program.

The Act made the RARE II study conducted by the Forest Service final as to wilderness areas in Alaska. Congress states that it has reviewed and approved the RARE II as to Alaskan lands for purposes of NEPA, RPA and NFMA, and the Wilderness Act. The Act precludes any judicial review of RARE II with respect to NFS lands in Alaska. The Act does not affect ongoing litigation or work under RARE II for NFS lands in states other than Alaska.³⁴ Lands designated by the Act as wilderness are final, and the Forest Service may so treat them in developing its initial land management plans under RPA and NFMA.³⁵ The Forest Service does not have to conduct any further wilderness study or manage the lands to protect wilderness values, unless the lands were designated wilderness or study areas by this Act or remained in further planning as of December 2, 1980. The Forest Service is prohibited from conducting, without express congressional authorization, any further statewide study of NFS lands in Alaska to determine their suitability for inclusion in the National Wilderness Preservation System.³⁶

Wilderness areas or study areas in Alaska are subject to special provisions concerning fisheries and uses.³⁷ The Act provides, "the Secretary of Agriculture may permit fishery research, management, enhancement, and rehabilitation activities within national forest wilderness and national forest wilderness study areas designated by this Act."³⁸ The Secretary is authorized to issue reasonable regulations to achieve these purposes. Permanent facilities and improvements may be allowed such as a fish hatchery or fishpass. The facilities must be constructed in a manner that minimizes the adverse impacts on wildlife and that blends into the surrounding area. In addition, existing cabins may be continued and limited new cabins built for public use as the Secretary considers necessary. Also, the Secretary is to modify existing timber contracts to substitute non-wilderness area timber.

The Act also establishes simplified procedures for obtaining rights-of-way for transportation and utility systems over public lands in Alaska.³⁹ Within six months of December 2, 1980, the Secretaries of Interior, Agriculture, and Transportation, in consultation with heads of other appropriate agencies, must jointly issue regulations for a consolidated application form. The regulations must prescribe the contents and information needed to process an application depending on the type of system desired (pipeline, electric power transmission line, canal or ditch, road, dock, air strip, etc.).

The applicant must then file the consolidated form with each appropriate agency on the same day.⁴⁰ Within 60 days of filing, the agency head must notify the applicant that the application is, on its face, either sufficient under the Act and other laws applicable to the agency, or insufficient.⁴¹ If insufficient, the agency must indicate what further information is needed to make the application complete.

The agencies receiving the application must jointly prepare a draft environmental impact statement within nine months of the filing.⁴² The agency assigned lead responsibility must complete the EIS within one year of the filing. The time periods may be extended for good cause. During both periods the agencies must solicit and consider the view of other federal departments or agencies, the Alaska Land Use Council, the state, affected local governmental units, and affected native corporations. Also, after public notice, the agencies must consider statements and recommendations from interested individuals or organizations.

Within four months after publishing the final EIS, each agency must decide to approve or disapprove each authorization.⁴³ The decision must be made in light of applicable law and must be within the jurisdiction of the agency. The agency head must make specific findings supported by substantial evidence. The findings have to consider the need and economic feasibility of the system, alternative routes and modes of access, the feasibility and impacts of using different systems in the same area, "short- and long-term social, economic, and environmental impacts of national, State, or local significance," the impacts on national security interests, the impacts on the purposes for which the federal unit was established, measures to mitigate or avoid adverse impacts, and the balance of the adverse effects on the short- and long-term public values against the short- and long-term public benefits from the approval.⁴⁴

Transportation and utility systems for which there is no applicable law are subject to different criteria.⁴⁵ The head of the concerned agency has to recommend approval of the request if, within four months of filing a final EIS, the head determines (a) that the system is compatible with the purpose for which the conservation unit system was established, and (b) there is no economic, feasible, and prudent alternative route for the system.

A presidential appeal and review procedure is also established by the Act. For transportation or utility system requests for which there is applicable law and which do not cross any wilderness areas, each agency must approve the authorization within its jurisdiction.⁴⁶ If one or more federal agencies disapprove the request, the system is deemed disapproved, and the applicant may appeal the disapproval to the President.⁴⁷ The President has four months after an appeal is filed to decide to approve or disapprove the application.⁴⁸ The system must be approved if the President, after considering the facts originally evaluated by the appropriate agencies, determines that the system is compatible with the purposes of the conservation unit system and there is no economically feasible and prudent alternative route for the system. The President's decision must be published in the Federal Register and accompanied by a statement of the President's reasons.⁴⁹ The President must consider the final EIS, the comments of the public and federal agencies, and the findings and recom-

mendations of the agencies in rendering a decision on the application.

For cases where there is no applicable law or the system will cross a wilderness area, the appropriate agencies must notify the President of their tentative approval or disapproval, including their comments and recommendations.⁵⁰ Within four months after receiving these notifications, the President must decide to approve or disapprove the application. In reaching this decision, the President must consider the final EIS and public and agency comments on the draft and final EIS.

If the President approves the system, his recommendation for approval of the transportation or utility system is sent to Congress for final action.⁵¹ This recommendation must be accompanied by the application involved, a report detailing the facts and reasoning for the findings and recommendations, the joint EIS, and a statement of conditions and stipulations that would apply to the system if it were approved by Congress. No application for a transportation or utility system is approved unless after the President's recommendation, a joint resolution of Congress is adopted approving the application.⁵² That resolution must be adopted within the first period of 120 days of continuous session of Congress after receipt of the recommendation.

Agency actions concerning approval of transportation or utility system rights-of-way, including review of any EIS, are granted expedited judicial review.⁵³ The denial of an appeal by the President or disapproving an application over wilderness lands is deemed final administrative action.⁵⁴ The applicant then can seek expedited judicial review of the decision.

Any right-of-way granted may be subject to terms and conditions the Secretary deems necessary.⁵⁵ Those may include provisions requiring use of the right-of-way in a manner consistent with the conservation unit established; restoration, revegetation, and curtailment of erosion; requiring compliance with applicable air and water quality standards; and width limitations to minimize or avoid harm to the environment, damage to public or private property, and hazards to public health and safety. Provisions also may be included to protect the interests of persons in the area who rely on the fish, wildlife, and biotic resources for subsistence. The conditions also may require use of measures to avoid or mitigate adverse environmental, economic, and social impacts.

NOTES

¹Pub. L. No. 96-487, 94 Stat. 2371 (to be codified at 16 U.S.C. §§ 3101 et seq.).

²Id. § 501(a), 94 Stat. 2371, 2398.
³Id. § 501(b), 94 Stat. 2371, 2399.
⁴Id. § 502, 94 Stat. 2371, 2399.
⁵Id. § 503(a), 94 Stat. 2371, 2399.
⁶Id. § 503(d), 94 Stat. 2371, 2400.
⁷Id. §§ 503(f)(1) & (2), 94 Stat. 2371, 2400.
⁸Id. § 503(h)(2), 94 Stat. 2371, 2400.
⁹Id.
¹⁰Id. §§ 503(h)(2)(A)-(C), 94 Stat. 2371, 2400.
¹¹Id. § 503(h)(3), 94 Stat. 2371, 2400-01.
¹²Id. §§ 503(h)(3)(A)-(D), 94 Stat. 2371, 2401.
¹³Id. § 503(h)(4)(A), 94 Stat. 2371, 2401.
¹⁴Id.
¹⁵Id. § 503(h)(5), 94 Stat. 2371, 2401.
¹⁶Id. § 503(h)(6), 94 Stat. 2371, 2401-02.
¹⁷Id. § 503(i)(1), 94 Stat. 2371, 2402.
¹⁸Id. § 504(b), 94 Stat. 2371, 2403.
¹⁹Id. §§ 504(d)(1)-(3), 94 Stat. 2371, 2404.
²⁰Id. § 504(e)(2), 94 Stat. 2371, 2404.
²¹Id. § 504(e)(1), 94 Stat. 2371, 2404.
²²Id. § 504(f), 94 Stat. 2371, 2404-05.
²³Id. § 505, 94 Stat. 2371, 2405. See also id. § 1315(b), 94 Stat. 2371, 2484, for provisions authorizing restoration and rehabilitation of fisheries in Alaskan wilderness areas or study areas.
²⁴Id. § 505(a), 94 Stat. 2371, 2405.
²⁵Id. § 505(b), 94 Stat. 2371, 2405-06.
²⁶Id. § 505(b)(4)(A), 94 Stat. 2371, 2406.
²⁷Id. § 505(b)(4)(B), 94 Stat. 2371, 2406.
²⁸Id. § 505(b)(5), 94 Stat. 2371, 2406.
²⁹Id. § 505(d), 94 Stat. 2371, 2406.
³⁰Id. § 704, 94 Stat. 2371, 2419.
³¹Id. § 705, 94 Stat. 2371, 2420.
³²Id. § 705(a), 94 Stat. 2371, 2420.
³³Id. § 708, 94 Stat. 2371, 2421.
³⁴Id. § 708(b)(1), 94 Stat. 2371, 2421.
³⁵Id. § 708(b)(2), 94 Stat. 2371, 2421.
³⁶Id. § 708(b)(4), 94 Stat. 2371, 2422.
³⁷Id. § 1315, 94 Stat. 2371, 2484-85.
³⁸Id. § 1315(b), 94 Stat. 2371, 2484.
³⁹Title XI, id. §§ 1101-13, 94 Stat. 2371, 2457-66.
⁴⁰Id. § 1104(c), 94 Stat. 2371, 2459.
⁴¹Id. § 1104(d), 94 Stat. 2371, 2459.
⁴²Id. § 1104(e), 94 Stat. 2371, 2459-60.
⁴³Id. § 1104(g), 94 Stat. 2371, 2460.
⁴⁴Id. §§ 1104(g)(2)(A)-(H), 94 Stat. 2371, 2460-61.

⁴⁵Id. § 1105, 94 Stat. 2371, 2461.
⁴⁶Id. § 1106(a)(1)(A), 94 Stat. 2371, 2461.
⁴⁷Id. § 1106(a)(1)(B), 94 Stat. 2371, 2461.
⁴⁸Id. § 1106(a)(2), 94 Stat. 2371, 2461.
⁴⁹Id.
⁵⁰Id. § 1106(b), 94 Stat. 2371, 2462.
⁵¹Id. § 1106(c), 94 Stat. 2371, 2462-63.
⁵²Id. § 1106(c)(1), 94 Stat. 2371, 2462.
⁵³Id. § 1108, 94 Stat. 2371, 2464.
⁵⁴Id. §§ 1106(a)(4) & (b)(2), 94 Stat. 2371, 2462.
⁵⁵Id. § 1107, 94 Stat. 2371, 2463-64.

C. ADMINISTRATIVE FUNCTIONS*

1. Personnel Management

Among the benefits provided by the Forest Service for its employees are several medical and death benefits. The Forest Service will pay the expenses to care for an employee's grave when the employee was killed fighting a forest fire.¹ For employees engaged in hazardous work, the Forest Service will spend money for medical supplies and services necessary for their immediate relief. This includes notification of next-of-kin and transportation to a point where public transportation is available.² Also, in cases where an employee is located in isolated situations, the Secretary of Agriculture may, out of general expenses appropriations, provide for the employee's medical expenses. This includes transportation to hospitals and, in case of death, to the nearest place where the employee's body can be prepared for shipment or burial.

If the employee is temporary and either a transient or away from home, the Forest Service can pay for medical expenses, lodging, and expenses for up to 15 days. The costs will be paid from the funds applicable to that person's work.³ A similar benefit is available to volunteers injured while fighting forest fires. In such instances, the Forest Service will provide for the volunteer's medical expenses, subsistence, and lodging for a maximum of 15 days. The cost will be paid out of that work's appropriation unless that person is covered by a state or other compensation act.⁴

The Forest Service also provides temporary financial assistance for its employees. The Secretary of Agriculture may furnish subsistence to Forest Service employees to purchase personal equipment and deduct it from the employee's salary.⁵ Also, when a temporary employee is injured and needs financial assistance to avoid hardships, Forest Service appropriations chargeable with salaries and wages are available to that employee at rates not in excess of the U.S. Employees' Compensation Act for lost time due to the injury in official work. Such payments will

* The notes for part C begin on p. 108.

be made for a maximum of 15 days, and the amount will be deducted from any amount otherwise payable by the U.S. Employees' Compensation Commission.⁶

There are also several miscellaneous benefits which the Forest Service provides. Funds available to the Forest Service may be used for expense of transporting automobiles of employees transferred between duty stations in Alaska.⁷ Such funds also may be used for reimbursement up to \$100 for loss or damage to clothing and other personal effects of an employee from fires, floods, or other casualties at or near the place where such property is temporarily stored during the employee's service in connection with the casualty.⁸ Forest Service funds may be expended to provide for recreational facilities, equipment, and services for use of employees located in isolated situations. The total expenditure shall not exceed \$35,000 annually.⁹ Funds also are available to pay travelling expenses of an employee but only when the employee is travelling on business directly connected with the Forest Service. Forest Service funds may be used to finance the preparation or publication of articles, but only those scientific or technical articles prepared for or published in scientific publications.¹⁰ Finally, Forest Service funds are available to underwrite telephone service for the residence of an employee or a person cooperating with the Forest Service who resides within or near NFS land if the Secretary determines such service is needed to protect the land. When applicable, the Forest Service will pay the monthly service charge, but it will pay for only those tolls or other charges as are required for public business.

2. Budget

All national forest revenues are directed by law to be "covered into the Treasury of the United States as a miscellaneous receipt. . . ." ¹¹ From these funds only so much as is necessary to refund deposits or to repay money erroneously collected is made available to the Forest Service.¹² The Forest Service, as administrators of the national forests, receive income from various sources. Some of this income is appropriated to the states or to other government agencies. Twenty-five percent of all monies received by a national forest will be paid to the state of the unit's location.¹³ The money is to be used for the benefit of public schools and roads in the county or counties where the unit is located. For the sale of timber products, the amount must be based on the timber's stumpage value.¹⁴ When the national forest is located within more than one county, the proceeds from that forest will be divided proportionately between the counties according to the forest's area within those counties.¹⁵ Another ten percent of all monies received by a national forest must be available for construction and maintenance of roads and trails within the forests or the state from which the money is derived. This implies that the money need not be spent in the same forest from which it came, but in any of the national forests within the state.¹⁶

A large number of special appropriations and special funds are authorized for a number of different purposes, including land acquisition, reforestation, and revegetation, and roads and trails. Many of these are discussed where appropriate elsewhere in this study. The Forest Service maintains several funds from which it pays its expenses. Forest Service funds will be used to pay for expenses of or assessments for construction of sidewalks, curbs, or street paving along the boundary of government-owned residential or improved lots.¹⁷ Appropriations may be spent for the construction of buildings, lookout towers, etc., on land owned by someone other than the Forest Service, provided the Forest Service obtains the right to remove the structures within a reasonable time after termination of the land use right.¹⁸

Also, funds may be authorized for the establishment of water rights necessary or beneficial to the national forests. In other areas, the Forest Service will spend money for the protection and management of lands under contract for purchase or under condemnation proceedings.¹⁹ The Forest Service may also contract for aerial services to manage and protect forest and other lands administered by it.²⁰

To facilitate some expenditures, the Forest Service has created several funds which have specific purposes. One such fund is the "Forest Service Cooperative Fund." Money from timber purchasers are deposited in this fund. Such monies will be available for scaling services requested by purchasers above and beyond that required by the Forest Service.²¹ There is also a working capital fund from which necessary expenses are paid. Such expenses include construction of buildings and furnishing supply and equipment services.²² Another fund is created from forfeitures of permits on timber purchasers and judgments, compromises, or settlements for damage to land. The money will be used to correct the situation which generated the fund.²³

After each update of the Assessment and the Program, the President is directed to transmit with the Assessment to Congress a detailed Statement of Policy to be used in framing budget requests.²⁴ Beginning with the budget for fiscal year 1977, Forest Service budget requests must "express in qualitative and quantitative terms" the extent to which the projected budget's programs conform to the Statement of Policy submitted with the Assessment. Reasons for the request must be given in cases in which the budget recommends a course that does not conform to the Statement.²⁵

Budgetary problems could constitute a major stumbling block to implementation of the new NFMA planning process. There is no assurance that Congress will appropriate the additional monies that will be required to satisfy land management planning requirements of NFMA.²⁶ The possibility

that it will not, underlines the importance of the Program and the Assessment and input from the respective national forest units into their formulation.

NOTES

¹16 U.S.C. § 554c (1976).

²*Id.* at § 554b.

³*Id.* at § 557.

⁴*Id.* at § 580(j).

⁵*Id.* at § 557.

⁶*Id.* at § 580(j).

⁷*Id.* at § 556(b).

⁸*Id.* at § 556(c).

⁹*Id.* at § 554(d).

¹⁰*Id.* at § 556. Forest Service appropriations may be used to pay all or part of the costs of publishing these articles; this would not include the costs of research or preparation of the articles.

¹¹*Id.* at § 499.

¹²*Id.*

¹³*Id.* at § 500. This section was amended by NFMA so that beginning October 1, 1976, the term "moneys received" will include all collections under the Knutson-Vandenberg Act (§ 576) and all amounts earned or allowed any purchaser of national forest timber and other forest products for the construction of roads on the National Forest Transportation System in connection with any timber sales contract. This is appropriately the result of conflict between this section and the Knutson-Vandenberg Act (see discussion of § 576 in section II.B. *supra*). The court, in Alabama v. United States, 461 F.2d 1324 (Ct. Cl. 1972), determined that these sections were to be read *in pari materia*. The court concluded that the "all moneys received" language of section 500 did not include the moneys received by the Forest Service pursuant to Knutson-Vandenberg, which money is to be used for reforestation, and thus was not subject to the revenue-sharing provisions of section 500.

¹⁴*Id.* at § 500. Under the original Act, there was no provision regarding the value of timber products. This provision was added in 1944, 58 Stat. 737. This provision was intended to preclude the government's having to base percentage payments to states from the sale of certain forest products upon receipts representing a return of production costs and to further limit the base to which the percentage would be applied. See Alabama v. United States, 461 F.2d 1324 (Ct. Cl. 1972). However, there is no indication that only the money received from timber sales was to create the base. The money is appropriated to the states, which in turn distribute it among the eligible counties.

¹⁵16 U.S.C. § 500 (1976).

¹⁶*Id.* at § 501.

¹⁷*Id.* at § 555(b).

¹⁸*Id.* at § 571(c).

¹⁹*Id.* at § 527.

²⁰*Id.* at § 579(a).

²¹*Id.* at § 572(a). See the discussion of cooperative programs, section D *infra*.

²²16 U.S.C. § 579(b) (1976). There was once a \$25,000 limitation on this working capital fund. However, a 1962 amendment removed that limitation, and now the statute reads "without fiscal year limitation."

²³*Id.* at § 579(c).

²⁴*Id.* at § 1606(a).

²⁵*Id.* at § 1606(b).

²⁶See Wilson, Land Management Planning Process of the Forest Service, 8 ENV'T'L L. 461, 476 (1978).

D. RESEARCH AND COOPERATIVE AGREEMENTS*

In addition to the statutes and regulations that directly govern Forest Service research, cooperative agreements, grants, and procurement, there are two general federal statutes that govern Forest Service outwardly in this area. The first is the Federal Property and Administration Services Act.¹ This Act requires all executive agencies to make purchases and contracts in accordance with the statute and implementing regulations² unless the Act is made specifically inapplicable by another statute.³ A fair proportion of the total purchases and contracts for property and services for the government shall be placed with small business concerns.⁴ All purchases and contracts for property and services shall be made by advertising, unless they fit within any of the 15 enumerated exceptions.⁵ If any agency head believes that bids received are in violation of the antitrust laws, he shall refer the matter to the Attorney General.⁶ Furthermore, no contract for the carriage of government property shall require carriage of such property in cargo containers of any stated length, height, or width.⁷

Where advertising is required, advertisements for bids must be done a sufficient time prior to the purchase or contract, and invitations for bids shall permit full and free competition, consistent with the purposes of the agency in procuring the goods or services.⁸ All bids shall be publicly opened, and the winner must be notified in writing with reasonable promptness. The award should be made to the bidder whose bid will be the most advantageous to the government, considering price and other factors. All bids may be rejected by the agency head if it is in the public interest to do so.⁹

Every negotiated contract (i.e., those not advertised) must contain a suitable warranty that no person or selling agent has been employed to

* The footnotes for part D begin on p. 114.

solicit such contract for a commission, percentage, brokerage fee, etc., except bona fide employees. The statute prohibits the use of the cost-plus-a-percentage-of-cost system of contracting and limits cost-plus-a-fixed-fee contracts to a 10% fee. All non-advertised contracts must have a clause that gives the government the right of access to and the right to examine any directly pertinent books, documents, papers, and records of the contractor (with exceptions for foreign contracts).¹⁰ Provision may be made for payment of indirect costs in cost-type research and development contracts with educational institutions.¹¹ Any executive agency may make advance, partial, progress, or other payments upon the provision of adequate security by the contractor. Payments made cannot exceed total unpaid contract price.¹²

An agency head can request the Comptroller General to waive any liquidated damages paid by the contractor if in the public interest.¹³ An agency head is authorized to delegate his powers provided by this chapter to other officers of the agency except for certain powers relating to negotiated contracts which are only delegable to a chief officer. The determinations of agency heads with respect to procurements are to be final. Written findings are required for determinations or decisions required to exempt procurement from the advertising requirements. Data with respect to negotiation of any purpose or contract shall be preserved in files of the agency for six years following final payment on the contract.¹⁴ The Act defines an agency head as head or assistant head of an executive agency.¹⁵ Sections 255 and 258 are not applicable to the procurement of property or services made by an executive agency. Any other laws which authorize an executive agency to procure property without advertising or without regard to section 255 shall be construed to authorize procurement by negotiation pursuant to section 252(c)(15).¹⁶

The second statute that generally affects federal contract, procurement, and cooperative agreement policy is the Federal Grant and Cooperative Agreement Act of 1977.¹⁷ The purpose of the Act is "to distinguish federal grant and cooperative agreement relationships from federal procurement relationships . . ." and to unify the use of the terms "contract," "grant agreement," and "cooperative agreement" by setting up guidelines for the use of the respective terms.¹⁸

Each executive agency shall use procurement contracts:

(1) whenever the principal purpose of the instrument is the acquisition, by purchase, lease, or barter, or property or services for the direct benefit of the federal government, or (2) whenever an executive agency determines in a specific instance that the use of a type of procurement contract is appropriate.¹⁹

Each executive agency shall use grant agreements whenever:

(1) the principal purpose of the relationship is the transfer of money, property, services, or anything of value to the state (or local government or other recipients) in order to accomplish a public purpose of support or stimulation authorized by federal statute rather than acquisition of property as described in (1) above; and (2) no substantial involvement is anticipated between the executive agency, acting for the federal government, and the state (or others) during performance of the contemplated activity.²⁰

Each executive agency shall use cooperative agreements whenever there is anticipated to be a substantial involvement between the executive agency and the cooperator and the purpose of the agreement is the transfer of money, property, or services or the accomplishment of a public purpose.²¹

The Act authorizes executive agencies to transfer title to personal property to eleemosynary institutions engaged in accountable research.²² It also authorizes executive agencies to enter into grants, contracts, and cooperative applicants as defined by the Act.²³ Finally the Act authorizes a study by the Director of the Office of Management and Budget, in cooperation with the executive agencies, to develop a better understanding of alternative means of implementing federal assistance programs. A report is to be made to Congress as soon as practicable, but no later than two years from date of enactment of this Act.²⁴

In addition to the general governmental statutes discussed above, the Forest Service's efforts in the areas of cooperative agreements and research activities are governed by two recently enacted statutes directed specifically to Forest Service activities. These statutes are the Forest and Rangeland Renewable Resources Research Act of 1978,²⁵ and the Cooperative Forestry Assistance Act of 1978.²⁶ Both provide for a new system to cope with the problems of research and cooperative agreements, and both repeal numerous previous statutory directives to the Forest Service.

1. Cooperative Fire Control

(1) The specific area of cooperative between the Forest Service and states is fire control. The Secretary of Agriculture may enter into forest fire protection agreements with states or groups of states concerning state and private lands on watersheds of navigable rivers within those states. Before any such agreement can be made,

the state involved must have already provided by law for a system of forest fire protection. No expenditures can exceed the amount the state has appropriated for the same purpose during the same fiscal year.²⁷

The Secretary is authorized to enter into cooperative agreements with public or private agencies, including the lending of personnel for the purposes of fire protection.²⁸ These agreements include such items as timber stand improvement, debris removal, and thinning of trees. The Secretary is further authorized to transfer to states and political subdivisions or agencies thereof, fire lookout towers and other structures or improvements used by the Forest Service for fire suppression purposes. If the land connected is outside the boundaries of a national forest, it may also be transferred. However, if any transferred property is not put to the use for which it was intended within two years from the date of the transfer, then title immediately reverts to the United States. Also, if within fifteen years from the date of transfer, the property ceases to be used for its intended purposes for a period of two years, title shall revert to the United States.²⁹

In another area of fire control, the Forest Service may rent fire control equipment to any state, county, private, or other non-federal agency cooperating with the Forest Service under the terms of a written agreement.³⁰ Furthermore, the Forest Service may sell fire equipment and supplies to any of the aforementioned agencies under the same conditions. Any money received must be reimbursed to the same appropriations from which the equipment was procured.³¹

The Cooperative Forestry Assistance Act of 1978 dealt specifically with the problem of rural fire prevention and control. The Act authorizes the Secretary to cooperate with state foresters or other state officials in developing systems for the prevention, control, suppression, and prescribed use of fires on rural lands.³² It also authorizes the Secretary to provide financial, technical, and related assistance to state foresters as well as to states in their cooperative efforts to train and equip local firefighting forces in rural areas.³³

The Secretary is directed to encourage the use of excess personal property by state and local fire forces receiving cooperative assistance.³⁴ The Secretary shall seek the assistance of the Administrator of General Services and shall attempt to coordinate the Administrator's efforts with those of the Secretary of Commerce acting under the Federal Fire Prevention and Control Act of 1974.³⁵ The Act requires that there be immediately established in the Treasury a special rural fire disaster fund to be used by the Secretary as a supplement to any other money otherwise available to carry out the purposes of the Act. Before the Secretary can commit monies from this fund, he must determine that state and local resources are

being fully utilized to deal with one or more rural fire emergencies in that particular state.³⁶ The Act also authorizes an annual appropriation of funds as may be needed to implement the purposes of the fire prevention program.³⁷

2. Cooperative Forestry Management

The Cooperative Forestry Assistance Act of 1978 also repealed much of the earlier statutory material dealing with cooperative forestry management. The purpose of the Act was to authorize the Secretary to assist non-federal landowners in advancing forest resource management, in encouraging the production of timber, in preventing and controlling insects and diseases, in preserving and controlling forests, and in making more efficient utilization of wood and wood residues while improving the fish and wildlife habitats of forestland.³⁸ The Act states that it is in the national interest for the Secretary to work through and with state foresters in implementing federal programs that affect non-federal forest lands.³⁹

The Act lists six major areas in which the Secretary can provide financial, technical, and related assistance: (1) developing genetically improved tree seeds; (2) production and distribution of tree seeds for establishing forests, windbreaks, and other plantings; (3) planting tree seeds and trees for the reforestation of non-federal land suitable for the production of timber; (4) planning management systems of silvicultural practices on non-federal land; (5) protecting or improving soil fertility and the quality, quantity, and timing of water yields; and (6) providing technical information to landowners regarding such matters as harvesting, processing and marketing of timber, conversion of wood to energy, management planning and treatment of forest land, protection of soil fertility, and the effects of silvicultural practices on fish and wildlife and their habitats.⁴⁰ Annual appropriations of such sums as are needed to implement the section are authorized by the Act.⁴¹

The Act authorizes the Secretary to develop a new forestry incentives program. The purpose of the new program is to encourage private landowners to utilize silvicultural practices that will provide for afforestation, reforestation, and other modern forest resource management techniques.⁴² The heart of the program is a cost-sharing scheme primarily for landowners owning 1000 acres or less of private forest land. For private forest land of between 1000 and 5000 acres the Secretary may approve cost sharing if significant public benefits will accrue. The Secretary cannot approve a cost-sharing program with landowners who own more than 5000 acres.⁴³

To implement the program the Secretary must adopt regulations after consultation with a committee to consist of at least five state foresters

or their equivalent in their respective state governments. The regulations must contain guidelines for administration of the cost-sharing program and an identification of those measures and actions eligible for cost-sharing.⁴⁴ Before any cost-sharing can be approved, the landowner must develop and submit an individual forest management plan, which shall serve as the basis for the agreement. The private landowner must develop these plans in cooperation with and with the approval of the state forester.⁴⁵ After the submission of an approved individual forest management plan, the Secretary shall agree to cost-sharing if he deems it appropriate. The federal portion of the costs is that which is necessary and appropriate up to a maximum of 75 percent. The Secretary and the committee in consultation shall set a maximum amount any one landowner may receive in the regulations.⁴⁶

The Act specifies that the funds available for cost-sharing shall be distributed among the states after considering the following factors: (1) acreage of private commercial forest land in each state; (2) potential productivity of the land; (3) number of ownerships eligible under the program; (4) need for reforestation or other timber improvements; and (5) enhancement of other forest resources.⁴⁷ If determined by the Secretary as in the best interest purposes of the program, an advertising and bid procedure may be used to decide which if any lands are to be covered by cost-sharing agreements.⁴⁸

The Act also provides a new category of forestry assistance, namely, urban forestry.⁴⁹ The Secretary may provide financial, technical, and related assistance to state foresters or other state officials to encourage urban forestry programs including the planting of trees in open spaces, greenbelts, and parks. Appropriation authority for such funds as needed to implement the section is provided.

3. Cooperative Insect and Disease Control

The Cooperative Forestry Assistance Act of 1978 repealed the White Pine Blister Rust Protection Act⁵⁰ and the Forest Pest Control Act.⁵¹ In their place the Act provides authority to the Secretary to protect the national forests from insects and diseases.⁵² To accomplish this purpose the Secretary is to conduct the following types of activities in national forests and on other federal, state, or private land with the approval of the landowner: (1) survey the land for insect or disease infestation; (2) determine the necessary biological, chemical, or mechanical measures needed to deal with the condition; (3) plan, organize, and direct measures deemed necessary to control the condition; (4) provide technical information and assistance in coordinating the use of pesticides or other toxic substances; and (5) take any actions deemed necessary to accomplish the purposes of the section.⁵³

The Secretary can conduct no operation to control pests or diseases on non-NFS land without the consent, cooperation, or participation of the landowner. No money can be expended by the Secretary on non-NFS land unless the private landowner has contributed or agreed to contribute to the costs of the needed work in an amount and in a manner satisfactory to the Secretary. The Secretary may allocate money appropriated under this section to other federal agencies to suppress insect infestations and disease epidemics affecting those other federal lands.⁵⁴ No money appropriated under this section is to be used to pay the cost of felling or removing dead or dying trees unless the Secretary decides that such actions are necessary to prevent further spread of insects or disease. Moreover, no money can be spent for compensating the value of any property injured, damaged, or destroyed. To fight any disease or insect infestation, the Secretary may procure materials and equipment without regard to the usual federal procurement policies contained in section 5 of Title 41.⁵⁵ Again Congress has authorized annual appropriations at the level needed to implement the section.

4. Cooperative Watershed Management

The Secretary of Agriculture may aid state, local, or regional governments in their plan for works of improvement by conducting investigations and surveys, preparing plans and estimates, preparing cost benefit analysis, providing financial and other assistance, obtaining the assistance of other federal agencies, and carrying out agreements with local landowners.⁵⁶ Whenever assistance is made to a local organization, the Secretary of Agriculture must notify the Secretary of Interior.⁵⁷ Further, the Secretary of Agriculture in cooperation with other federal and with state and local agencies may make investigations and surveys of the watersheds of rivers and other waterways as a basis for the development of coordinated programs. In some areas, the program of the Secretary of Agriculture may affect public or other lands under the jurisdiction of the Secretary of Interior. In these cases, the Secretary of Interior is authorized to cooperate with the Secretary of Agriculture in the planning and development of works or programs for such lands.⁵⁸

The Secretary of Agriculture is also a member of the Water Resources Council (WRC) as created by the Water Resources Planning Act.⁵⁹ The subordinating bodies of the WRC are the River Basin Commissions (RBC).⁶⁰ The RBC will include, among others, one member from each federal department or independent agency determined by the President to have a substantial interest in the work to be undertaken by the commission. The member is to be appointed by the head of the department or independent agency and will serve as its representative.⁶¹ Therefore, if the Forest Service has a substantial interest in the work

to be undertaken by an RBC, a member of the Forest Service will be appointed to the commission at the time it is created.

Upon request of the chairman of any RBC, the head of any federal department or agency such as the Forest Service may furnish the commission any available information as may be necessary for carrying out its function. The agency also may detail on temporary duty to the commission such personnel within its administrative jurisdiction as it may need to carry out the commission's functions. Personnel so assigned will not lose seniority, pay, or other employee status.⁶²

5. General Cooperative Programs

The Cooperative Forestry Assistance Act of 1978 did not repeal earlier statutory directives in the area of general cooperative programs, but it did add some new material and programs. The Act authorizes the Secretary to provide financial, technical, and related assistance to state foresters or equivalent state officials to help them form state organizations that will better fulfill their forestry responsibilities on non-federal forests. This assistance can relate to management techniques, budget and fiscal accounting services, personnel training, and management information services and recordkeeping. Assistance to state organizations may be rendered only after a request by an appropriate state official.⁶³ The Secretary is further authorized to provide assistance to state foresters in the area of forest resources data relating to natural resources planning at the federal or state level.⁶⁴

In a provision designed to encourage the development of new forestry technology, the Secretary is authorized to carry out a program of technology implementation. If assistance is unavailable through the state forestry organization, the Secretary can act through other USDA agencies, or other institutions, organizations, and individuals to strengthen technical assistance and service programs of cooperators, to study the effect of tax laws on forest management, to develop and maintain information systems, to test and evaluate chemicals for use in forests, and to conduct other activities (including the training of state forestry personnel) to deal with the issues faced by a state forestry organization.⁶⁵ In carrying out any cooperative agreement under this section, the Secretary can make funds available without regard to the prohibition against advancing public funds contained in section 529 of Title 31.⁶⁶

To maximize benefits from the activities authorized under the Cooperative Forestry Assistance Act of 1978, the Secretary on request of any state may consolidate any annual financial assistance payments to the state in lieu of cost-sharing mechanisms, formulas, or agreements if these consolidated payments do not include money from any special Treasury fund such as the special rural fire prevention fund or money appropriated

under the forestry incentives program. Before the Secretary can approve a consolidation, he must review the state's application and the effectiveness of its forest resources programs. Consolidated payments to any state cannot exceed the total amount of non-federal funds expended within that state on its forest resources program.⁶⁷ The Secretary has some flexibility in that payments for selected activities can exceed the state portion of the program if, in toto, non-federal expenditures exceed federal expenditures for forest resources programs. The state forester or equivalent state official must certify that the conditions of the statute have been met before the Secretary can approve a consolidation request. Subject to the annual appropriation bills, the total amount of financial assistance under the consolidated payment program cannot be less than the base amount of financial assistance provided the state under section 2111 during the 1978 fiscal year.⁶⁸

Finally the Act mandates that to the maximum extent practicable the Secretary shall work through and cooperate with state foresters, encourage cooperation between state foresters, and use and encourage cooperators to use resources from both the private and public sector.⁶⁹ All monies appropriated under the chapter shall remain available until expended.⁷⁰ Contracts and cooperative agreements undertaken under repealed acts will remain in force until they expire by their own terms. Funds appropriated under the authority of the repealed acts shall also be available for expenditure under the Act.⁷¹ The Secretary is authorized to prescribe rules and regulations to implement the provisions of the Act and must consult with a committee of not less than five state foresters in preparing regulations that deal with federal assistance to state organizations. The Secretary can make grants, agreements, contracts, and other arrangements as necessary to implement the Act.⁷² The Act does not, however, give the Secretary the authority to regulate the private use of land.⁷³

In addition to these new provisions, prior statutory guidelines govern other types of general cooperative programs that may be entered into by the Secretary of Agriculture. The Secretary may, where public interest justifies, cooperate with public or private agencies, organizations, institutions, and persons in performing work done on land situated within or near a national forest when money is deposited to cover the cost of such work. The agency or interested party must deposit payments of sufficient amounts to cover the total estimated cost for administration, protection, improvement, reforestation, and other types of work as the Forest Service is authorized to do on federal lands. Cooperation also is authorized in the performance of work connected with the occupancy or use of national forests or other lands administered by the Forest Service.⁷⁴

The monies deposited under this program will be covered into the Treasury and will constitute a special fund to be available until expended for cost of work performed by the Forest Service and for refunds if an excess exists. Payment for work may be made from any Forest Service appropriation available for similar types of work, if so provided by written agreement.⁷⁵

When, by terms of a written agreement, a party furnishes materials, supplies, equipment, or services for fire emergencies in excess of its proportionate share, adjustment may be made by reimbursement or replacement in kind by the amount destroyed in excess of the furnishing party's proportionate share. Reimbursements received from agencies, organizations, institutions, or persons covering their proportionate share will be deposited to the credit of the initial Forest Service appropriations for similar purposes available at the time of deposit.⁷⁶ Deposits received for work on adjacent or overlapping lands, or for work on lands determined to cover a single work unit, may be expended on such confined areas. Refunds from deposits expended on overlapping areas will be made to depositors on a proportionate basis.⁷⁷

A final cooperative program is in the area of law enforcement. The Secretary of Agriculture is vested with the authority to enter cooperative agreements for the protection of national forests and national grasslands. This agreement can include provisions for the reimbursement to states (or their subdivisions) of expenses in connection with activities on national forest lands.⁷⁸

6. Research Programs

The Forest Service also is active in the area of research. It is involved in several research programs, although some are very limited in application. This section will deal with current programs. The programs that are directly related to Forest Service activities will be given the main focus. As with the Cooperative Forestry Assistance Act of 1978 the research programs of the Forest Service are now principally governed by a new Act, the Forest and Rangeland Renewable Resources Research Act of 1978.⁷⁹

The Research Act attempts to coordinate previous research efforts and to help implement and complement the provisions of RPA/NFMA.⁸⁰

While some earlier statutory provisions dealing with research programs were repealed, several programs which will be discussed later were left intact. The Secretary is given a broad mandate to conduct, support, and cooperate in research activities dealing with forest and rangeland renewable resources in rural, suburban, and urban areas. The Research Act identifies five major areas of research: (1) renewable resource management research, including managing, planting and reproducing vegetation on forests and range-

land; (2) renewable resource environmental research, including hydrological studies, improving fish and wildlife habitats, and others; (3) renewable resource protection research dealing with endangered species and disease and insect problems; (4) renewable resource utilization; and (5) renewable resource assessment research, including matters relating to data collection and analysis.⁸¹

To have an adequate data and scientific base for the period assessment the Secretary must make and keep a current comprehensive survey and analysis of conditions of and requirements for the renewable resources of the forests and rangelands of the United States. The Secretary must conduct the survey and analysis under such plans as he shall determine to be fair and equitable and in cooperation with appropriate state or other officials.⁸²

The Secretary is authorized to establish and maintain a system of experiment stations, research laboratories, experimental areas, and other research facilities as needed. To implement these provisions, the Secretary with appropriated or donated funds may acquire the needed land by lease, donation, purchase, exchange, or otherwise.⁸³

The Secretary may cooperate with public and private institutions including universities in creating these types of research facilities.⁸⁴ The Research Act also provides the Secretary with authority to accept donations for a research facility with such gifts to be deposited in a special fund in the Treasury.⁸⁵

In addition to grants made under other statutory provisions, the Secretary can make competitive grants for research activities that will emphasize basic and applied research projects that are important to achieving the goals of the statute. Grants are to be made at the discretion of the Secretary under whatever conditions the Secretary may prescribe after public solicitation of research proposals. The Secretary may reject any proposal if deemed in the public interest to do so.⁸⁶

The Secretary can make money available to cooperators and grantees under the provisions of the Research Act without regard to 31 U.S.C. § 529, which prohibits the advancing of public funds. The Secretary must coordinate research and comparative efforts under this statute with cooperative and grant programs established by other statutes. The Secretary must disseminate the knowledge and technology developed by these grants and cooperative agreements. To the extent the Secretary deems appropriate the Secretary shall use, and encourage cooperators and grantees to use, the best available skills from outside disciplines, seek and encourage a proper mix of short and long-term research, avoid unnecessary duplication, and encourage the development and exchange of qualified scientists and

other specialists to improve the quality of forest and rangeland renewable resource research.⁸⁷

Congress authorized the appropriations of such funds as needed to implement the subchapter. Because the Research Act repealed the McSweeney-McNary Act, the statute provides that all agreements made under that Act will remain in force until revoked or amended under their own terms. Finally the Secretary is authorized to issue such rules and regulations as necessary to implement the provisions of the Act.⁸⁸

The Research Act did not repeal statutory provisions dealing with cooperative research agreements with states and universities. The Secretary is authorized to cooperate with the states for the purpose of encouraging and assisting them in carrying out programs of forestry research.⁸⁹ One form of cooperative research is a grant to a state college. This assistance will be by plans drawn up by the Secretary and land grant colleges or agricultural experiment stations or other state universities offering graduate training in sciences basic to forestry and having a forestry school.⁹⁰ The appropriation to each school is limited to that amount allocated from non-federal sources for forestry research.⁹¹ The scope of this research will include investigations of the following: reforestation and land management for timber production; forest and related watershed management to improve waterflow conditions and to protect against floods and erosion; forest and rangeland management for forest production; land management for outdoor recreation; and protection of forest lands against fire, insects, disease, and other destructive agents; utilization of forest products; development of sound policies of land management and harvesting and marketing facilities; and any other studies necessary to obtain fullest use of forest resources.⁹²

The available funds will be apportioned among the states by the Secretary after consultation with a national advisory board. This board consists of at least seven officials of the forestry schools of the eligible state universities. Apportionment factors should include areas of non-federal commercial forest lands and volume of timber cut annually.⁹³

There are other research projects which are not as broad in scope. Research is conducted by the Secretary of Agriculture in the distribution and marketing of agricultural products, including forest products.⁹⁴ Important in the area of research is the authorization to erect buildings and other structures on non-government land leased for experimental forests.⁹⁵ Also, an expenditure of \$50,000 in any one fiscal year is authorized, if no more than \$10,000 is spent on any one item, for purchases of new devices for experimentation or in designing new equipment.⁹⁶ Finally, forest research is authorized in cooperation with foreign countries. The research is carried out in foreign scientific institutions. The objective of this program is to collect, collate, translate, abstract,

and disseminate scientific activities and support them overseas.⁹⁷

The Forest Service, as a federal agency, must follow certain guidelines in conducting its research. The collection of information through the use of questionnaires must be done with a minimum of burden to business enterprises or people and at a minimum cost. The data collected must be tabulated so as to be most useful to other federal agencies and the public.⁹⁸ Information collected may be released to another federal agency only if (1) the information is in the form of statistical total or summaries, (2) it is not confidential, (3) persons supplying the information consent, and (4) the receiving federal agency has authority to collect the information.⁹⁹

NOTES

¹Act of June 30, 1949, C.288, 63 Stat. 393 (1949), as amended and codified at 41 U.S.C. §§ 251-60 (1976).

²See, e.g., 41 C.F.R. §§ 1-100 *et seq.* and §§ 4-1.000 *et seq.* (1978).

³41 U.S.C. § 252(a) (1976).

⁴*Id.* at § 252(b).

⁵41 U.S.C. § 252(c) provides:

(c) All purchases and contracts for property and services shall be made by advertising, as provided in section 253 of this title, except that such purchases and contracts may be negotiated by the agency head without advertising if--

- (1) determined to be necessary in the public interest during the period of a national emergency declared by the President or by the Congress;
- (2) the public exigency will not admit of the delay incident to advertising;
- (3) the aggregate amount involved does not exceed \$10,000;
- (4) for personal or professional services;
- (5) for any service to be rendered by any university, college, or other educational institution;
- (6) the property or services are to be procured and used outside the limits of the United States and its possessions;
- (7) for medicines or medical property;
- (8) for property purchased for authorized resale;
- (9) for perishable or nonperishable subsistence supplies;
- (10) for property or services for which it is impracticable to secure competition;
- (11) the agency head determines that the purchase or contract is for experimental, developmental, or research work,

- or for the manufacture or furnishing of property for experimentation, development, research, or test;
- (12) for property or services as to which the agency head determines that the character, ingredients, or components thereof are such that the purchase or contract should not be publicly disclosed;
- (13) for equipment which the agency head determines to be technical equipment, and as to which he determines that the procurement thereof without advertising in special situations or in particular localities in order to assure standardization of equipment and interchangeability of parts and that such standardization and interchangeability is necessary in the public interest;
- (14) for property or services as to which the agency head determines that bid prices after advertising therefor are not reasonable (either as to all or as to some part of the requirements) or have not been independently arrived at in open competition: Provided That no negotiated purchase or contract may be entered into under this paragraph after the rejection of all or some of the bids received unless (A) notification of the intention to negotiate and reasonable opportunity to negotiate shall have been given by the agency head to each responsible bidder and (B) the negotiated price is the lowest negotiated price offered by any responsible supplier; or
- (15) otherwise authorized by law, except that section 254 of this title shall apply to purchases and contracts made without advertising under this paragraph.
- ⁶⁴¹ U.S.C. § 252(d) (1976).
- ⁷ Id. at § 252(f).
- ⁸ Id. at § 253(a).
- ⁹ Id. at § 253(b).
- ¹⁰ Id. at § 254.
- ¹¹ Id. at § 254a.
- ¹² Id. at § 255.
- ¹³ Id. at § 256a.
- ¹⁴ Id. at § 257.
- ¹⁵ Id. at § 259.
- ¹⁶ Id. at § 260.
- ¹⁷ Pub. L. No. 95-244, 92 Stat. 3 (1977), codified at, 41 U.S.C. §§ 501 et seq.
- ¹⁸ 41 U.S.C. § 501 (Supp. II 1978).
- ¹⁹ Id. at § 503.
- ²⁰ Id. at § 504.
- ²¹ Id. at § 505.
- ²² Id. at § 506(b).

- ²³ Id. at § 506(a).
- ²⁴ Id. at § 509.
- ²⁵ Pub. L. No. 95-907, 92 Stat. 353 (1978), codified at 16 U.S.C. §§ 1641 et seq.
- ²⁶ Pub. L. No. 95-313, 92 Stat. 365 (1978), codified at 16 U.S.C. §§ 2101 et seq.
- ²⁷ 16 U.S.C. § 563 (1976). The antecedents of section 563 are not so much with forest fire protections as with the protection of watersheds of navigable streams.
- ²⁸ Id. at § 565a-1.
- ²⁹ Id. at § 565b.
- ³⁰ Id. at § 580.
- ³¹ Id. at § 580a.
- ³² Id. at § 2106(b).
- ³³ Id. Rural areas are defined according to 7 U.S.C. § 1926(a)(7) (1976).
- ³⁴ Id. at § 2106(c)(1). Excess personal property is defined by the Federal Property and Administrative Services Act of 1949, c. 288, 63 Stat. 377 (1949).
- ³⁵ 16 U.S.C. § 2106(d) (Supp. II 1978).
- ³⁶ Id. at § 2106(f).
- ³⁷ Id. at § 2106(e).
- ³⁸ Id. at § 2101(b).
- ³⁹ Id. at § 2101(c). The Act was seen as a complement to the new federal land management directives contained in RPA/NFMA. Id. at § 2101(d).
- ⁴⁰ Id. at § 2102(b).
- ⁴¹ Id. at § 2102(c).
- ⁴² Id. at § 2103(a).
- ⁴³ Id. at § 2103(c).
- ⁴⁴ Id. at § 2103(d). The committee of state foresters has other functions relating to the administration of the overall cooperative effort between the Forest Service and the states. Id. at § 1699(c).
- ⁴⁵ Id. at § 2103(e).
- ⁴⁶ Id. at § 2103(f).
- ⁴⁷ Id. at § 2103(g).
- ⁴⁸ Id. at § 2103(h).
- ⁴⁹ Id. at § 2105.
- ⁵⁰ Act of April 26, 1940, 54 Stat. 168.
- ⁵¹ Act of June 25, 1947, c.141, 61 Stat. 177.
- ⁵² 16 U.S.C. § 2104 (Supp. II 1978).
- ⁵³ Id. at § 2104(b).
- ⁵⁴ Id. at §§ 2104(c)-(e).
- ⁵⁵ Id. at § 2104(f).
- ⁵⁶ Id. at § 1001. For a fuller discussion of the Watershed Protection and Flood Prevention Act see part II.B.2, supra. For the purpose of these provisions, local organization means any state, political subdivision thereof, soil or

water conservation district, flood prevention or control district, or combinations thereof, or any other agency having authority under state law to carry out, maintain, and operate the works of improvement. Local organization also includes any irrigation or reservoir company, water user's association, or similar organization having such authority and not being operated for profit that may be approved by the Secretary. Id. § 1002.

⁵⁷Id. 16 U.S.C. § 1008 (1976).

⁵⁸Id. at § 1006.

⁵⁹Id. at § 1962a. For a full discussion of the Water Resources Plans Act, see part II.B.2, supra.

⁶⁰42 U.S.C. § 1962b (1976).

⁶¹Id. at § 1962b-1(b).

⁶²Id. at § 1962b-4(d).

⁶³16 U.S.C. § 2107(a) (Supp. II 1978).

⁶⁴Id. at § 2107(b).

⁶⁵Id. at § 2107(c).

⁶⁶Id. at § 2107(d).

⁶⁷Id. at § 2108(a).

⁶⁸Id. at § 2108.

⁶⁹Id. at § 2109(a).

⁷⁰Id. at § 2109(b).

⁷¹Id. at §§ 2111(b)-(c).

⁷²Id. at § 2109.

⁷³Id. at § 2110.

⁷⁴16 U.S.C. § 572 (1976).

⁷⁵Id.

⁷⁶Id. at § 572(c).

⁷⁷Id.

⁷⁸Id. at § 551a.

⁷⁹Pub. L. No. 95-307, 92 Stat. 353, codified at 16 U.S.C. §§ 1641 et seq. (Supp. II 1978).

⁸⁰16 U.S.C. § 1641 (Supp. II 1978).

⁸¹Id. at § 1642(a).

⁸²Id. at § 1642(b).

⁸³Id. at § 1643(a).

⁸⁴Id. at § 1643(c).

⁸⁵Id. at § 1643(b).

⁸⁶Id. at § 1644.

⁸⁷Id. at § 1645.

⁸⁸Id. at § 1647.

⁸⁹16 U.S.C. § 582a-1 (1976).

⁹⁰Id. at § 582a-1.

⁹¹Id. at § 582a-3.

⁹²Id. at § 582a-6.

⁹³Id. at § 582a-4.

⁹⁴Id. at § 1622(d).

⁹⁵Id. at § 571c.

⁹⁶Id. at § 580c.

⁹⁷Id. at § 1704(b)(3).

⁹⁸44 U.S.C. § 3501 (1976).

⁹⁹Id. at § 3508.

III. Implementation of the Management Mandate

The emphasis of the Forest and Rangeland Renewable Resources Planning Act (RPA) of 1974 was congressional overseeing of the Forest Service through the requirement of extensive reporting and formulation of a recommended Renewable Resource Program.¹ The NFMA of 1976 continued those requirements but provided for additional reports and added new procedures and requirements for the Assessment, Program, and the Annual Report on the Program.² The most significant additions, however, relate to two general areas: (1) timber production and (2) land management planning. Aside from the several provisions which either establish or require the Secretary to establish standards for timber production,³ the most significant provisions concern regulations and standards for land management planning.⁴ NFMA constitutes a commitment to land management planning as the primary means to implement the statutory mandate to manage effectively the renewable resources of the national forests.⁵

Under the Act the Forest Service now has the responsibility to prepare inventories and assessments. Those will be used to develop programs that determine what the Forest Service wants to do. From the programs the Service formulates plans which set forth how the management will be done. In many instances the Forest Service must make reports of its progress in carrying out these functions.

A. REPORTS, INVENTORIES, AND ASSESSMENTS

In adopting the RPA as amended by NFMA, the Congress eschewed the language of proposed legislation that would have had the effect of imposing a so-called "national land management prescription" on the Forest Service. Congress instead appears to have opted for a compromise between the two poles of strongly centralized and detailed direction of planning from the national level, either from Congress or the Secretary on the one hand, and a primarily decentralized and piecemeal planning and management of the Forest Service on the other. In enacting this compromise legislation, the Congress seems purposely to have left details and specific management prescriptions to the individual land management plans themselves. But the legislation clearly contemplates appropriate management direction on a national basis, including establishment of a general framework for development of each land management plan. The Act has specifically imposed certain national requirements.

1. Assessment⁶

The first basic responsibility of the Forest

* The notes for chapter III begin on p. 124.

Service at the national level is to update during 1979 and each tenth year thereafter the Renewable Resource Assessment, which was first prepared under the RPA in 1975. The Assessment is to include a comprehensive inventory of the national renewable resources; supply and demand needs of the United States; the international market situation; description of Forest Service programs; discussion of policy, law, or other factors expected to significantly affect forests and rangelands; and evaluation of opportunities for improvement. Starting with 1979, the assessment is to include reports on fiber potential, potential for waste product utilization, and fiber fabrication facilities. In preparing these reports, the Secretary must provide "opportunity for public involvement" and must consult with other interested governmental departments.

The emphasis of the Assessment is data collection, including inventories of the renewable resources, the supply of goods and services available, and the demand for them. This data is acknowledged as basic to decisions concerning the management and use of the forests' resources.⁷

2. Program⁸

Prepared from the Assessment, the Program is transmitted with the Assessment by the President to Congress with a statement of the Administration policy in framing budget requests. It includes alternatives for protection, management, and development of the NFS, forest roads and trails, and cooperative programs and research.

The Program is to conform to Multiple-Use Sustained-Yield and NEPA. The 1975 program is to be updated at least once every five years. The Program must contain a number of things:

- (1) inventory of investment needs and opportunities;
- (2) identification of anticipated results to aid cost-benefit analysis;
- (3) discussion of priorities of Program opportunities in relation to cost-benefit;
- (4) detailed study of personnel needed to "implement and monitor" programs; and
- (5) recommendations which--
 - (a) evaluate objectives for programs to determine multiple-use and sustained-yield relationships "among and within the renewable resources";

- (b) explain opportunities for private owners to improve land and renewable resources therefrom;
- (c) recognize need to protect and improve quality of soil, water, and air resources;
- (d) state national goals recognizing interdependence of renewable resources;
- (e) evaluate impact of export and import of raw logs on domestic timber supplies and prices.

The Program is the long-range tool for congressional oversight of the Forest Service. Congress has directed the Secretary to establish as soon as practicable a process to project long-term costs and benefits for the evaluations required in the Program.⁹ The analysis of the costs and benefits must include samples of the following costs: reforestation, timber stand improvement, and sale of timber. These costs should be compared with the "return to the government" from timber sales. A summary of the data in the findings must be submitted to the Congress in the annual report. This summary should identify the advertised timber sale contracts which were made below the estimated expenditures.

3. Reports

The Act specifically requires the Secretary to prepare the following reports:

- (1) An annual evaluation RPA report.¹⁰ Beginning with the third fiscal year after August 17, 1974, which shall include--
 - (a) evaluation of the component elements of the Program;
 - (b) progress in implementing the Program together with accomplishments as they relate to the objectives of the Assessment;
 - (c) description of the status of major research programs, significant findings, and how they will be applied to forest management;
 - (d) summary of data and findings resulting from the estimates of the cost-benefit analysis to support program evaluation as required in section 1604(1), implementing section 1606(d);
 - (e) assessment of the balance between economic and environmental quality factors;

- (f) plans for implementing corrective action;
- (g) recommendations for new legislation where warranted;
- (h) progress in incorporating the newly-required standards and guidelines in land management plans (see section 1604(c));
- (i) beginning with fiscal year 1978, identification of the amount and location of all land in the NFS in need of reforestation.¹¹

- (2) Special report on Dutch Elm Disease by March 1, 1977, to include a study of its incidence and methods for controlling, plans for research and action plans, including outreach and public information.¹²

- (3) Annual report on the types and uses of herbicides and pesticides annually in the NFS and the effects.¹³

The importance attached by Congress to the reporting requirements of NFMA is obvious. These requirements are the basic means by which Congress will be able to review the land management planning decisions of the Forest Service. To this end, NFMA added a provision to RPA that the Program should include a study of the personnel requirements needed to implement and monitor ongoing programs.¹⁴

B. LAND USE MANAGEMENT PLANNING

Under the RPA of 1974 as amended by NFMA of 1976, all units of the NFS are to be managed under land management plans developed in accordance with NFMA.¹⁵ The land management plans for units of the NFS are to implement the Program.¹⁶ Under section 1604(a) the Secretary is directed to develop plans "as part of the Program" and in section 1604(g)(3) to promulgate regulations specifying guidelines "for land management plans developed to achieve the goals of the Program." The Act mandates general procedures in the planning process and requirements for the plans themselves. In addition, it specifically requires the Secretary to promulgate regulations which set out the planning process and "guidelines and standards" for preparation of the plans.¹⁷

The regulations which set forth the guidelines and standards for land management plans were to be promulgated no later than October 22, 1978. The regulations were finally issued on September 17, 1979, to be effective on October 17, 1979. The Act also directs the Secretary to "attempt to complete" the incorporation of those guidelines and standards into the plans for

each unit by no later than September 30, 1985, if not before; but until that time a unit may be managed "under existing land and resource management plans."¹⁹

The legislative history is scanty as to the intended meaning of the provisions of NFMA of 1976 relating to the mechanics of forest planning. But what legislative history there is strongly suggests that the members of Congress involved in the drafting and debating of NFMA had an unsophisticated and simplistic view of planning. That this would be so is understandable in view of the relatively new state of the art in the planning profession and the lack of familiarity with the planning process generally by members of Congress.

NFMA seems to contemplate these steps in the management of the national forests:

(1) Program. Based on the Assessment, the Program generates the goals, objectives, and opportunities for maximizing the benefits of both public and private forest and rangeland;

(2) Planning Process. Based on the Program, those involved in the planning process evaluate the opportunities in light of the general goals and objectives generated in the Program, which evaluation provides the basis for generation of alternative uses of the unit planned for;

(3) Land Management Plan. The ultimate scheme of actions or alternative actions proposed--what will be done and how--is the end product of the planning process;

(4) Planning Documents. The embodiment of the plan in written material in "one document or set of documents" may also be referred to as the "plan."

1. Program

The RPA Assessment and Program is a kind of "national plan." It provides a foundation for forest planning by setting long-range goals and objectives and national resource output targets. A suggestion has been made that the Program will be used to allocate appropriate quotas to the regions.²⁰ There is a definite need for direction from the national level, but establishment of specific quotas could be inconsistent with other provisions of NFMA. If resource outputs are dictated to the land management planning team, the flexibility of the team to accomplish multiple-use objectives could be foreclosed or compromised.

The most significant role of national planning is the collection of as complete an inventory of the national forest resources as possible. Without this data, a meaningful determination of priorities, opportunities and targets will be difficult. The national level of planning also can provide a valuable input into the planning process that may not otherwise be available, namely, the wants and needs of the national public.

The national interest is an appropriate factor in evaluation of the potential uses of the national forests, a national asset. Only local publics may be represented, however, in the participatory process of planning at the local level.

2. Planning Process

The NFMA does not contain a definition of "plan" apparently because Congress thought it unnecessary. The absence of a definition poses a problem, however, because the term "plan" may refer either to the "proposed action" or the outline, diagram, map, or other physical or graphic representation of the proposed action, or both.²¹ Making this distinction could be important in determining the minimum requirements for, and the limitations on, the planning process.

The NFMA requires the Secretary to promulgate regulations that set out the planning process and the guidelines to achieve certain objectives by the plan. But the Act contains no directive to promulgate regulations for the form of the planning document itself. In section 1604(f), Congress itself provided limited minimum requirements relating to the form of the document.²²

Subsection (f) requires only that the "integrated plan for each unit of the National Forest" be "a document or set of documents" which incorporates "all the features required by this section [§ 1604]" and which is "embodied in appropriate written material, including maps and other descriptive documents, reflecting "proposed and possible actions."²³

The sparsity of language makes an important point. Congress did not contemplate that the document or documents constituting the actual plan be either lengthy or complex. Regardless of what may have been included within the covers of documents referred to as plans in the past, the minimally acceptable planning document under NFMA could be short and simple.²⁴ Planning decisions need to be documented, of course, but this need may be met in a number of ways.

There is clearly a need to determine the minimum requirements of the plan--that is, what it physically must contain. There is a danger that over-inclusion will invite attack. Section 1604(f) establishes as minimum requirements that the planning document:

- (1) be "written" in "one document or set of documents" which includes maps or other descriptive documents (presumably for review purposes);
- (2) reflect "proposed or possible actions" (this could mean "possible" but disregarded by planners, or "possible" under the plan; "proposed" seems clear enough--i.e.,

what the ID team intends to have done);

- (3) incorporates "all the features required by this section [§ 1604]."²⁵

The language requiring incorporation of "all the features required by this section" is a problem.²⁶ "Incorporate" means "to unite thoroughly with or work indistinguishably into something already existent."²⁷ Section 1604(c) directs the Secretary to "incorporate the standards and guidelines required by this section in plans for units of the National Forest System."

How is the "incorporation of features" and "standards and guidelines" requirement to be reconciled with the mandate of other parts of section 1604, particularly subsection (g), to adopt what certainly will be an extensive maze of regulations, guidelines, and standards for planning? The key may be the interpretation of the word "incorporate." Congress could hardly have intended the absurd and meaningless (as well as costly) exercise of physically including verbatim restatement in each land management plan of all the regulations which specify guidelines and standards for plans. A more plausible interpretation is that these standards and guidelines are not to be physically attached but are to be substantively included within the document. In other words, the standards and guidelines need not be stated but their substance needs to be an integral part of the document. Literally this could mean that the standards and guidelines are to be physically included within the planning document. And some language in the debates would suggest this was the interpretation given by some.²⁸ But other evidence is found that the plans only are to be made "consistent with the guidelines" of the section.²⁹

Requiring the plan to actually incorporate the standards and guidelines required under the section could in effect require that each plan require a virtual reprint of the planning regulations³⁰ and large portions of the Forest Service Manual. This would obviously add considerable bulk to the planning document. It could be argued, however, that having the standards and guidelines in the plan would provide a reference point or a basis to evaluate the ultimate plan. But these regulations and directives would be available to the public anyway.

NFMA requires that there be one plan "for each unit of the National Forest System."³¹ But nowhere in the Act is a definition of the word "unit" given. The final regulations implementing NFMA attempt to define "unit" only indirectly. They describe the "forest plan" that will constitute the land management plan to be developed according to section 6 of NFMA. The final regulations state that:

One forest plan may be prepared for all lands for which a forest supervisor has responsibility, or separate forest plans

may be prepared for each national forest, or combination of national forests, within the jurisdiction of a single forest supervisor.³²

This provision obviously is based on the present reality that some national forests do not have only one forest supervisor; in some instances, two or more separate national forests are grouped and administered by one forest supervisor, and in other instances, a national forest may be divided into two or more separate administrative units, each having its own forest supervisor. This reality apparently was not considered when the requirement of an integrated plan for each "unit of the National Forest System" was discussed and finally enacted. But the concept of "unit" in the Act did not escape the attention of the legislators. It was the subject of considerable discussion in the business meetings of the Subcommittee on Forests of the Committee on Agriculture on Tuesday, June 30, 1976, at which the then-Chief of the Forest Service, John R. McGuire, was present. In discussions of the language of this section, Chief McGuire stated that the practice of the Forest Service was to prepare separate management plans for "units within the forest." He stated that:

Some national forests have one plan for the whole forest, but more typically there may be from 5 to 15 units within the forest for which separate land management plans are prepared.³³

When queried about the language of the proposed statute, Chief McGuire acknowledged (and the subcommittee seemed to agree) that the language contemplated the unit for which integrated plan was required as the "whole forest."³⁴ The Chief, however, wanted the Forest Service to have the flexibility "to proceed area by area" (presumably meaning geographical area, i.e., "different parts of the forest") and also to prepare different functional plans. He mentioned separate plans for timber programs, recreation, roads, etc. The Chief said he thought the language would be clearer if it were interpreted to mean "one single document." Apparently, at the suggestion of the Forest Service the language "one document" was changed to read "in one document or set of documents."³⁵

Later in the meetings, the Chief called the term "unit" "somewhat confusing" because he saw it as applying to two different ideas.³⁶ He described the Forest Service's planning process as involving separation of a single national forest into separate planning "units" for which plans for the different resources were developed. But he stated his belief that the term "unit" as used in the NFMA meant a national forest.³⁷

The legislators involved in the discussions of NFMA acknowledged the distinction between so-called "planning units" and the forest itself.³⁸ They also recognized the need to consider, at the

early stages of planning, various resource uses separately. But the concept of a single plan for each unit reflects a congressional intent that the final selection of management alternatives be based on consideration of the resource uses collectively and the impacts of those uses on the forest unit as a whole. A secondary reason for the requirement of one plan (or an integration of separate plans in one document) for one unit was to "facilitate public involvement in the planning process."³⁹

Although the deliberations on the proposed legislation may have assumed the term "unit" meant a designated national forest in all instances, perhaps the Forest Service may be able to use a slightly different administrative entity for planning purposes. If the Forest Service were to treat the land management planning unit as that area of national forest system lands under one forest supervisor, some of 20-odd plans would be for parts of one designated national forest and others would be for a composite of two or more designated national forests. This arguably would not be inconsistent with the legislative intent even if certain members of Congress assumed the basic administrative unit in all instances was the designated national forest. Regardless of any assumptions, Congress obviously wanted the plan to operate as a guide for the person ultimately responsible for forest management, which is the forest supervisor.

Moreover, the statutory language does not by its terms preclude an administrative unit other than the designated national forest. NFMA does not direct a single plan for each designated national forest, but instead "for each unit" of the NFS. An argument can be made that Congress could have just as easily have used the language "each national forest" (as it did in other parts of the Act) if that is what it intended.

Additional support for the reasonableness of denominating the unit as that land area under the jurisdiction of a forest supervisor is found by looking at the purpose behind the language. The purpose was to eliminate piecemeal "planning" through separate resource plans and separate functional plans for small areas (so-called "planning units") within a larger management area. Congress seems to have been primarily concerned that the Land Management Plan integrate and coordinate the functional and resource planning into one plan regardless of the area covered.

Of course, a planning unit could be so defined so as to defeat this integration and coordination objective and to violate the multiple-use concept as seen by Congress. Ad hoc definition of planning units markedly different than the geographical boundaries of designated national forests would be suspect. Selection of relatively homogeneous, small geographic units can affect, and to a large extent foreclose alternative planning strategies. But if the Forest Service consistently

applies a test of unit based on a rational criterion, the test should be acceptable. Moreover, if in those instances in which units as defined by this test are contiguous or in such geographical proximity that planning decisions on one unit may have an effect on the other, provision should be made for coordination of the planning efforts for the respective units. This would seem to be necessary to meet the multiple-use objectives of planning under NFMA.

The concept of the "integrated" plan is inextricably connected with the concept of "unit" under NFMA. The language of NFMA clearly states that the section 1604 LMPs shall "form one integrated plan for each unit . . ."⁴⁰ The legislative history strongly suggests that the two concepts were intended to achieve one end, namely, an appropriate balance of resource uses of the national forests. Under section 1604(b), originally enacted as part of the RPA of 1974, the Secretary was directed "to achieve integrated consideration of physical, biological, economic, and other sciences."⁴¹ In section 1604(e) the Secretary is directed to assure the LMPs "include coordination of" the multiple uses of MUSY of 1960.⁴² Hence, the notion of "integrated plan" has a definite substantive content and seems to be a clear departure from a number of different, single purpose, single function plans. The term "integrated" means "composed of several parts which make a whole; composite."⁴³ Under that definition, a mere collation or collection of single purpose plans loosely into one "plan" could suffice. But that does not appear to be the intent of Congress.

Another reason exists to view the integration requirement as more than a mere formality. Included with the section requiring one integrated plan is a directive that the plan be "available to the public at convenient locations."⁴⁴ Congress intended that planning documents not be so unwieldy, and disjointed so as to discourage meaningful public participation.

3. Preparation and Revision of the Integrated Plan

Part of the mandate of Congress in NFMA was for the Secretary to promulgate regulations that prescribed guidelines and standards for management of NFS land and that set out the process for development and revision of land management plans. The guidelines and standards as they relate to specific activities have been discussed elsewhere. The following is a discussion of the significant requirements for preparation of the plan. Congress has a direct opportunity to evaluate and review the Program which provides a basis for planning. But in the actual preparation of the plans to implement the Program, Congress relies on the checks and balances of the interdisciplinary approach and public participation.

(a) Interdisciplinary Approach

Section 1604(f)(i) of NFMA requires that the plans for each unit of the NFS be prepared by an "interdisciplinary team." The Act does not define what an interdisciplinary team is or what its makeup should be. But the interdisciplinary team concept obviously was inserted to fulfill the mandate of a "systematic interdisciplinary approach" under subsection (b), which is designed "to achieve integrated consideration of physical, biological, economic, and other sciences."⁴⁵

Congress did not mandate any specific duties for the team apparently because of "issues raised as to the vagueness of the language."⁴⁶ But Congress did provide for appointment by the Secretary of a "committee of scientists" not associated with the Forest Service to "provide scientific and technical advice and counsel on proposed guidelines and procedures to assure" the adoption of "an effective interdisciplinary approach."⁴⁷ Although the Act does not expressly direct promulgation of regulations concerning the team, the implication of subsection (h)(1) which provides for termination of the Committee of Scientists on adoption of regulations, is that regulations concerning the makeup of the interdisciplinary team should be adopted.

A provision concerning interdisciplinary review is contained in subsection 1604(g)(3)(F) relating to required guidelines for determination of timber harvesting methods. Under that subsection, guidelines are to be established which allow an even-aged management harvesting technique. It is not clear as to whether this "interdisciplinary review" is to be done by an interdisciplinary team. The Senate bill originally requiring interdisciplinary review was modified by adding the language "as determined by the Secretary." The purpose of this addition, according to the Conference Report, was to permit the Secretary to decide the scope and extent of the interdisciplinary review and to limit it to advertised sale areas.

One commentator on NFMA has assumed that this provision requires review by an interdisciplinary team of the potential impacts of a proposed sale.⁴⁸ But the Act expressly requires activity by the team only in preparation, "significant" amendment, and revision of land management plans. Presumably, a review by the team of proposed sales and harvesting methods could have and likely would have taken place when the plan was formulated. But there is no requirement that every proposed timber sale and the harvesting technique for each be included in the plan. The Act requires only that the "planned timber sale program and the proportion of probable methods of timber harvest within the unit necessary to fulfill the plan" be included. Accordingly, it is quite possible that a specific timber sale and its details would not have been specifically reviewed by the planning team. In such case, the Secretary apparently may decide that an adequate review has been conducted without the need to convene meetings for teams to review each proposed sale.

The Act itself does not in any way limit the Secretary's discretion in determining whether an interdisciplinary review of the type referred to in the Act has taken place. The question could be phrased in terms of whether a proposed sale or harvesting technique not specifically approved by the plan would constitute a "significant change" of conditions or be "a significant change" in the plan. If it did, the requirements of subsections (d), (e), and (f) concerning the procedure for adoption of plans would be triggered.

Literally, the term "interdisciplinary" means "involving two or more disciplines" or "representing two or more areas of knowledge, learning, or skill focusing on the same subject."⁵⁰ Accordingly, the concept of an "interdisciplinary team" could conceivably be met by a team of two persons with expertise in separate disciplines or skills. But an acceptable definition that will pass muster under the Act must be found by reference to the apparent purposes for NFMA's adoption of the interdisciplinary approach.

Some of the proposed versions of NFMA used the word "multidisciplinary." One proposal defined the term as meaning "a group of individuals consisting of specialists in the fields of silviculture, wildlife biology, fish biology, soils, hydrology, recreation, and such other specialists in other disciplines as the Secretary may prescribe."⁵¹

In subsection (g)(3)(F)(ii) of NFMA as enacted, the impacts to be considered when clearcutting is proposed are "environmental, biological, esthetic, engineering, and economic." As a practical matter, the minimum required expertise or skill represented in the planning team as a whole may vary from area to area.⁵²

The level and type of expertise required will depend on the critical issues and concerns that are identified in the planning process. Whether the makeup of the team ultimately is found to be appropriate will depend on whether the team is deemed a reasonable effort to respond to the issues in the unit.

As an internal device to accomplish objective consideration of all relevant inputs in the multiple-use planning process, the interdisciplinary approach probably has no equal. Perhaps the most troublesome aspect of the interdisciplinary approach, however, is the difficulty of meshing the efforts of persons from particular fields of competence in the decision-making process. The lack of objectivity problem is exacerbated if the persons ultimately responsible for making decisions also collect and assemble the data. The natural tendency is for each person to gather information for his or her particular field of competence.⁵³ Because objective and impartial decisionmaking is implicit in NFMA and is an element of NEPA, procedures

should be adopted to minimize the problem of special interests.

(b) Public Participation

Public participation is a critical part of the NFMA planning process. From the standpoint of the Forest Service, it serves three separate functions: (1) information to, and education of, the public; (2) opinion from the public; and (3) knowledge and expertise from the public.⁵⁴ Informing the public of decisions and the manner in which they were reached is important because it tends to make the decision more acceptable or, at least, less unacceptable. This psychological benefit of public participation may be as important from the agency's perspective as any other benefits. The basic purpose of the public participation requirement under NFMA, however, is to improve the quality of the product. The great amount of relevant technical information available outside the agency can contribute to the scientific and technological part of the planning process. Public opinion in terms of what people want also may be an important aid to determining respective values.

Notwithstanding NFMA's emphasis on "public participation" and "involvement"--one or the other term expressly appears eleven times, nowhere is either term specifically defined in the statute. It is not clear whether the terms "participants" and "involvement" as used in the statute are synonymous. At one point the term "public involvement" seems to be used to include both notice to the public and participation by the public.⁵⁵ The ordinary meaning of "participation" is the act of taking part, or having a part or share in something. "Involvement," on the other hand, suggests a more intense kind of activity, but it is sometimes used to describe engaging as a participant.

In FLPMA, "public involvement" is defined as "the opportunity for participation by affected citizens in rulemaking, decisionmaking, and planning with respect to public lands, including public meetings or hearings held at locations near the affected lands, or advisory mechanisms, or such other procedures as may be necessary to provide public comment in a particular instance."⁵⁶ As a related legislation, FLPMA may be determined as relevant to the interpretation of NFMA.

Under the Act the Secretary is directed to establish by regulation "procedures, including public hearings where appropriate" to give governmental authorities and the public "adequate notice and an opportunity to comment on formulation of standards, criteria, and guidelines applicable to Forest Service programs."⁵⁷ Specifically, the Forest Service must provide for "public participation in the development, review, and revision of land management plans" which at a minimum is to include "making the plans or revisions available to the public at convenient locations in the vicinity of the affected unit for a period of at least three months before final adoption."⁵⁸ During

that three-month period publicized "public meetings or comparable processes at locations that foster public participation" should take place.

Land management plans or revisions do not become effective under section 1604(j) until thirty days after completion of the "public participation and publication of notification" required under subsection (d). Moreover, under subsections (f)(4) and (5) of section 1604, "public involvement comparable to that required in subsection d" is necessary for adoption of amendments amount to "significant change" or revisions when conditions have changed.⁵⁹

The Secretary is required by regulation to establish procedures, "including public hearings, where appropriate, to give . . . adequate notice and opportunity for governmental entities and the public to comment on "formulation of standards, criteria, and guidelines."⁶⁰ Presumably regulations for public participation also must be promulgated for the planning process (section 6(d) provides that the Secretary "shall provide for" it). The Secretary must, at a minimum, in the planning process provide copies of plans and revisions at locations accessible to persons in the affected unit, hold meetings "or comparable processes at locations that foster public participation in the review of the plans," and publicize the meetings or processes.

Under subsection (d) then, public meetings do not appear to be required nor are they even preferred. Any "comparable" process would appear adequate. What would be an adequate or comparable substitute for public meetings is not indicated in the statute. Further questions concerning the scope and extent of participation are not answered by the express language of the statute. If meetings are held, how many would be adequate? Does the Forest Service need to publicize only the meetings concerning the plan or does it need to publicize the proposed plan itself? Whether regulations under subsection (d) are required or not by law, it is clear that interpretation of requirements under it will be difficult without them.

The extent of public participation in the planning process may depend on the level at which the various types of planning occur. The public theoretically has already had some input into the highest level of planning, the strategic (goal-setting) type of planning, through its elected representatives in Congress. Although planning is divided internally into three levels--strategic, management, and operational--the statute refers to public participation simply in land management planning or planning generally. Apparently, then, the public literally could be involved at all levels of planning. However, the language that the plans must be made available "at convenient locations in the vicinity of the affected unit" implies involvement at the local or operational level.

A real problem is how public is "public" under the statute. As an abstract proposition, the term "public" may refer to any community--national, state, or local. On the other hand, an argument can be made that the NFMA itself implies local public in subsection (d) of section 1604 by its emphasis on "the vicinity of the affected unit."⁶¹ On the other hand, section 1612 which refers to public participation in formulation of standards, criteria and guidelines is couched in terms of notice to "Federal, State and local governments and the public," implying a national public.⁶²

Past procedures for obtaining input into decisions by the Forest Service, an agency which must accommodate diverse interests under its multiple-use directive, have been criticized.⁶³ The accusation has been made that advisory boards have been "packed" with only interested users, that is, local interest groups, who tend to be commercially oriented. It has been argued that even non-local commercial interests have had an advantage over non-local recreational and other users in getting their views represented because of their financial and organization strength. Even at the national level, commercial users are said to have the advantage.

Regardless of the accuracy of these allegations, the Forest Service or any agency making decisions which affect public lands must protect itself from even the appearance of arbitrariness or bias. Moreover, the input of the public is important, but it should not be allowed to detract from the primary mandate of the Forest Service, that is, to plan and manage the national forests consistently with the multiple-use sustained-yield standard.

(c) Coordination and Review

Land management plans are to be coordinated with state, local, and other federal agencies.⁶⁴ The Forest Service also is directed to coordinate land use plans with those plans of Indian tribes ("approved tribal land resource management programs").⁶⁵ Land use plans are specifically required to be prepared in accordance with NEPA.⁶⁶ Thus, the planning process must be coordinated with the NEPA/EIS process.⁶⁷

Plans become final 30 days after completion of public participation and notification by the Secretary.⁶⁸ The plans cannot be amended without participation of the interdisciplinary team.⁶⁹

NOTES

¹Pub. L. No. 93-378, § 3, 88 Stat. 477, codified in 16 U.S.C. § 1601 et seq. (1976).

²16 U.S.C. §§ 1601, 1602, § 1606(d) (1976).

³These standards are discussed in section 1 of chapter II.B supra.

⁴The guidelines for land management planning

also relate to timber harvesting. See 16 U.S.C. §§ 1604(g)(3)(D), (E) & (F). The specific content of these guidelines, however, unlike the standards noted in note 3 supra, is left to the Secretary.

⁵Although NFMA was not intended to be a national land management prescription, the Act had as its purpose the establishment of "appropriate management direction" at the national level through planning guidelines developed by the Secretary. The details of application and specific management direction were to be accomplished in the plans. See Hall & Wasserstrom, The National Forest Management Act of 1976, 8 ENV'T L. 522, 530-31 (1978).

⁶16 U.S.C. §§ 1604(a)-(c) (1976).

⁷U.S. DEP'T OF AGRICULTURE, FOREST SERVICE, THE NATION'S RENEWABLE RESOURCES--AN ASSESSMENT 331 (1975).

⁸16 U.S.C. § 1602 (1976).

⁹Id. at § 1604(l).

¹⁰Id. at § 1606(c).

¹¹Id. at § 1601(d).

¹²Pub. L. No. 94-588, 80 Stat. 2949, § 20; 16 U.S.C. § 594-2 note.

¹³16 U.S.C. § 1601(e).

¹⁴Id. at § 1602(4).

¹⁵Id. at §§ 1604(a)-(f).

¹⁶Id. at § 1604(a).

¹⁷Id. at § 1604(g).

¹⁸44 Fed. Reg. 53928 (Sept. 17, 1979), adding part 217 to Title 36, C.F.R.

¹⁹16 U.S.C. § 1604(c) (1976).

²⁰See Wilson, Land Management Planning Processes of the Forest Service, 8 ENV'T L. 461, 474 (1976). The final regulations do not specifically contemplate quotas from the national level. See § 219.4(b)(1), 44 Fed. Reg. at 53978 (Sept. 17, 1979).

²¹"Plan implies mental formulation of a method, order, or form, or a graphic representation of one." WEBSTER'S NEW INTERNATIONAL DICTIONARY, 3d ed., s.v. "plan." There is a clear distinction between the term "plan in its non-technical usage (in which case it would connote the "scheme") and program for managing each unit of the forest.

²²Arguably, section 1604(e) also dictates what shall be included in the planning document itself. According to that subsection, the Forest Service must "assure" that plans (1) "provide for multiple use and sustained yield of the products" from the NFS, and "in particular, include coordination of outdoor recreation, range, timber, watershed, wildlife and fish, and wilderness"; (2) "determine forest management systems, harvesting levels, and procedures in light of all of the uses set forth in subsection (c)(1) [(e)(1)(2)], the definition of the terms 'multiple use' and 'sustained yield' as provided in the Multiple-Use Sustained-Yield Act, and the

availability of lands and their suitability for resource management." 16 U.S.C. § 1604(e) (1976). But this subsection appears to state more what the plan shall do rather than what it must look like. Of course, subparagraph (2) indicates what Congress apparently felt a plan should include but this would seem to be comprehended with the "proposed and possible actions" language of subsection (f).

²³16 U.S.C. § 1604(f) (1976).

²⁴Obviously, the team preparing the plan should document that it has complied with the requirements of the law (and the regulations and directives implementing the law), but that documentation is not really the plan.

²⁵16 U.S.C. §§ 1604(f)(1)-(3) (1976).

²⁶"Feature" means "a distinct or outstanding part or quality of something" or a "prominent part or characteristic." WEBSTER'S INTERNATIONAL DICTIONARY, 3d ed., at 382. By its common meaning, it is more than "element"--it is an outstanding, or distinct element. Of course, in common parlance, it may be used as any element, even nondistinctive or unimportant "features." This could become a controversial point.

²⁷WEBSTER'S NEW INTERNATIONAL DICTIONARY, 3d ed., 1260.

²⁸House Debate of H.R. No. 15069, Cong. Rec. August 17, 1976, at H. 13077 (comments of Rep. Brown).

²⁹See Senate Committee on Agriculture and Forestry, S. REP. NO. 94-893, May 14, 1976, at 17.

³⁰36 C.F.R. ch. II (1978).

³¹16 U.S.C. § 1604(f)(1) (1976).

³²44 Fed. Reg. 53979 (Sept. 17, 1979) (to be codified at 36 C.F.R. § 219.4(b)(3)).

³³Committee on Agriculture, Business Meetings on NFMA of 1976, 94th Cong., 2d Sess. 24, December 1976.

³⁴*Id.* at 25-26.

³⁵*Id.* at 26.

³⁶*Id.* at 79.

³⁷*Id.* at 80.

³⁸*Id.* at 89 (comment of Congressman Weaver).

³⁹REP. OF HOUSE COMM. ON AGRICULTURE on H.R. 15069, H.R. REP. NO. 94-1478, Part I, 30.

⁴⁰16 U.S.C. § 1604(f)(1) (1976). In the RPA, the terminology "land and resource management plans" was used, but under the NFMA such plans are to be replaced by "land management plans." See 16 U.S.C. § 1604(c) (1976). This change in language is consistent with the Act's commitment to an integrated plan for each unit which seeks to coordinate all resources and uses of the land area planned.

⁴¹Compare 16 U.S.C. § 1604(b) (1976) with Pub. L. No. 93-378, § 3(c), 88 Stat. 476 (1974).

⁴²16 U.S.C. § 1604(e) (1976).

⁴³WEBSTER'S INTERNATIONAL DICTIONARY, 2d ed. at 1290.

⁴⁴16 U.S.C. § 1604(f)(1) (1976).

⁴⁵*Id.* at § 1604(b).

⁴⁶H.R. REP. NO. 94-1478, 94th Cong., 2d Sess. 30.

⁴⁷16 U.S.C. § 1604(h)(1) (1976). The Secretary also is directed to "establish and consult such advisory boards as he deems necessary to secure full information and advice on the execution of his responsibilities" in providing for public participation in planning and management. These boards are to be "representative of a cross section of groups interested in the planning for and management of the National Forest System and the various types of use and enjoyment of the lands thereof." *Id.* at § 1612 (1976). This general directive appears to impose no specific responsibility on the Forest Service but in effect constitutes authority to obtain assistance from advisory boards that may or may not be exercised.

⁴⁸Strong, National Forest Management Act of 1976--What Impact on Federal Timber Management?, 13 IDAHO L. REV. 263, 273 (1977).

⁴⁹16 U.S.C. §§ 1604(f)(4) & (5) (1976). Whether a change is significant is a decision left to the discretion of the Secretary. Finding that a change is significant will trigger a revision of the LMP.

⁵⁰WILDLAND PLANNING GLOSSARY 102.

⁵¹H.R. 11894, § 3(13).

⁵²See 36 C.F.R. § 219.5(b) (1978).

⁵³DAVIS, LAND USE 296 (1976).

⁵⁴See Krutilla & Haigh, An Integrated Approach to National Forest Management, 8 ENV'T L. 373, 402-12 (1978).

⁵⁵16 U.S.C. §§ 1604(f)(4) & (5) (1976).

⁵⁶43 U.S.C. § 1702(d) (1976).

⁵⁷16 U.S.C. § 1612(a) (1976).

⁵⁸*Id.* at § 1604(d).

⁵⁹*Id.* at §§ 1604(f)(4) & (5).

⁶⁰*Id.* at § 1612.

⁶¹*Id.* at § 1604(d).

⁶²*Id.* at § 1612.

⁶³See 82 YALE L.J. 787, 793-95 (1972).

⁶⁴16 U.S.C. § 1604(a) (1976).

⁶⁵43 U.S.C. § 1712(b) (1976).

⁶⁶16 U.S.C. § 1604(g)(1) (1976).

⁶⁷See chapter IV.

⁶⁸16 U.S.C. § 1604(j) (1976).

⁶⁹*Id.* at § 1604(f).

The National Environmental Policy Act of 1969 (NEPA)¹ is probably the most significant statute concerning federal agencies and the environment. Its importance to, and impact on, the Forest Service cannot be underestimated. NEPA has provided a new basis of litigation to challenge several Forest Service activities which, before NEPA was enacted, may not have been subject to judicial scrutiny. All federal agencies have experienced a similar increase in litigation. The lawsuits often only show one facet of NEPA, its use as an obstacle to action. This emphasis on the negative distorts the positive objectives that Congress sought through NEPA. Those objectives allow agencies to undertake action by an improved decisionmaking and environmentally sound planning process. An examination of the objectives of NEPA will clarify its impact on agency decisionmaking and planning.

One objective of NEPA has been referred to by courts as "environmental full disclosure." NEPA requires that all environmental ramifications of a project, both pro and con, be examined by the agency undertaking the federal project. Included in this disclosure mandate is a discussion of the repercussions of alternatives to the project. Once this information has been gathered by the agency, it is to be disclosed to the public and concerned groups through the environmental impact statement. Moreover, the discussion of the environmental aspects of a proposed project contained in the impact statement must be given to the Council on Environmental Quality (CEQ)³ and the President. Through publication and distribution requirements for the environmental impact statement, the adverse environmental consequences of any proposed activity and means to minimize or avoid them are identified for the public, the CEQ, and the President. Congress is kept abreast of environmental issues, affairs, and developments through the Environmental Quality Report prepared annually for it by CEQ.⁴

Another objective of NEPA is to have federal agencies use an interdisciplinary approach in their planning process. This objective arises from section 102(2)(A) which requires that all federal agencies

utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment.⁵

An interdisciplinary approach is essential to achieving full and fair evaluation of environmental factors in the agency decisionmaking process.

Section 102(2)(A) gives congressional recognition to the fact that many agencies may lack the expertise to conduct the scientific and technological studies needed for a complete discussion of environmental factors concerning a particular project. Hence, agencies were required to develop procedures that would enable them to get the necessary data within the agency or by other means. These include consultation with universities, private individuals, and other agencies having the necessary expertise concerning a particular problem. In this manner every agency would be able to obtain the necessary information concerning the environmental factors of a proposed project and incorporate them into the responsible agency's decisionmaking process.

NEPA also was intended to achieve greater public awareness of the environmental effects of federal activities. The Act requires that the environmental impact statement be circulated to the public.⁶ This public involvement and awareness is also emphasized in section 101(a):

[T]he Congress . . . declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures . . . to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.⁷

This policy is reinforced by subsections (b) and (c) of section 101 which provide the means for furthering the policy statement. Subsection (b) states that "it is the continuing responsibility of the Federal Government to use all practicable means" so that the nation can

(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations; (2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings.⁸

This policy is again emphasized in subsection (c): "The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment."⁹ Together these provisions have been interpreted to place a greater obligation on agencies to solicit and encourage public participation both during the preparation stages of the impact statement as well as during the agency's decisionmaking process.

* The notes for chapter IV begin on p. 147.

IV. The National Environmental Policy Act of 1969

The last and perhaps most important objective of NEPA is to require federal agencies to consider environmental factors in the decisionmaking process. This is accomplished between NEPA's section 101 policy statement, which focuses on achieving harmony between man and his environment.¹⁰ The Act creates a guardian role for the federal government by assuring present and future generations of Americans a quality environment. And the Act requires these ideas be incorporated into the agency's decision through the environmental impact statement requirement. Thus, NEPA assures that agencies will be aware of the environmental effects of their actions before undertaking them. Moreover, in section 102(2)(C) the impact statement "... shall accompany the proposal through the existing agency review process."¹¹ The necessity of agency consideration of these factors is further emphasized in section 102(2)(B). That section requires a federal agency to

identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by subchapter 2 of this Chapter, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technological considerations.¹²

These objectives of NEPA and its policy of preservation of environmental quality are achieved through the procedural requirements which the statute imposes on federal agencies. In congressional hearings the section 102 mandates were called the Act's "action-forcing"¹³ provisions by which agencies fulfill the section 101 policies and objectives. Coordinating the implementation of these two sections enables an agency to comply with the letter and the spirit of the Act.

A. NEPA PROCEDURAL REQUIREMENTS

1. Interdisciplinary Approach

The first NEPA requirement directly affects the internal structure and organization of agencies. It imposes new methods of study on agencies. In section 102(2) Congress

authorizes and directs that, to the fullest extent possible . . . all agencies of the Federal Government shall--

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment.¹⁴

One impact of this requirement on agencies' planning requirements has been to include personnel from diverse fields on a planning team.

Scientists, sociologists, engineers, economists, and resource planners must be members of the team developing a plan for an agency. In some instances an agency may have to hire new personnel in areas or disciplines not otherwise covered within the agency or require consultation with other agencies or universities that can provide the needed expertise.¹⁵ An agency must be careful, however, not to shift or transfer the duty to prepare the environmental impact statement to others; that obligation always remains with the agency.¹⁶

2. Consideration of Unquantified Environmental Amenities

A related requirement is found in subsection (B) of 102. There agencies are directed to establish procedures in conjunction with the CEQ for assuring that unquantified environmental amenities will be considered in the decisionmaking process. That subsection addresses two problems: (1) evaluating the "presently unquantified environmental amenities" and (2) assuring that these are properly considered in the decisionmaking process.¹⁷ Both the evaluation and the consideration may require consultation with other agencies, governmental units, or the public.

3. Environmental Impact Statement

NEPA's most familiar procedural requirement is the "detailed statement," popularly known as the environmental impact statement (EIS). The EIS frequently documents the agency's compliance with the other section 102 mandates. Under section 102(2)(C) an EIS is required on any "major Federal actions significantly affecting the quality of the human environment."¹⁸ The contents of the EIS are easily stated. It must include:

- (i) the environmental impact of the proposed action,
- (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
- (iii) alternatives to the proposed action,
- (iv) The relationship between local short-term uses of man's environment and the maintenance and the enhancement of long-term productivity, and
- (v) any irreversible and irretrievable commitments of resources which would be involved if the proposed action should be implemented.¹⁹

In addition to preparation of the EIS, other obligations than merely preparing an EIS are imposed on an agency under section 102(2)(C). It also requires that the preparing agency "consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved."²⁰ Thus, interagency cooperation in the preparation of an EIS is needed. The

preparing agency also must circulate the EIS to other federal and state agencies responsible for setting performance standards concerning the environmental impact involved. In addition, the impact statement must be circulated to the CEQ, which was created as an advisory board to the Office of the President. Failure to develop procedures to provide for interagency cooperation and consultation and to circulate the EIS to the public, President, and CEQ as required by the Act may result in a proposed project being delayed until the necessary procedures are implemented.

The preparing agency must also make sure that the EIS is disseminated to the public.²² This is necessary for comment and input from interested groups. Under the CEQ final regulations on the implementation of NEPA,²³ agencies must adopt procedures that provide a draft EIS to the public, use public hearings when feasible, incorporate the comments and hearings into the final EIS, and include the agency's response to the public input in the final EIS.²⁴ In this manner full participation in the preparation of the EIS and in the decisionmaking process itself is assured. Because public awareness and participation in environmental matters is one of the principal objectives of NEPA, courts have closely scrutinized agencies' procedures to be sure that they achieve that goal.²⁵

Procedurally, an agency is also required to adopt measures to have the EIS available throughout its decisionmaking process. Specifically, NEPA requires that the EIS "shall accompany the proposal through the existing agency review process."²⁶ This has been interpreted to mean that an agency may not have staff or field persons prepare and review an EIS early in the process, but not have the EIS available to the ultimate decisionmaker.²⁷ The agency's procedures must require that the EIS is a part of the proposal's file from the time of its preparation until the ultimate decision is made concerning the proposed action. This is necessary to insure that the decisionmaker is fully aware of the environmental as well as other factors in making the determination of whether to proceed with the project. Because the EIS must thoroughly discuss alternatives to the action and ways to avoid particular environmental impact, this requirement enables the decisionmaker to be aware of different options available.

4. Consideration of Alternatives

In addition to the requirement that alternatives and their environmental effects be discussed in the EIS itself, NEPA mandates that agencies "to the fullest extent possible shall . . . study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources."²⁸ This provision has been construed by courts in conjunction with the EIS requirement to require that the

EIS do more than merely identify alternatives to the proposed action. Courts have required that the alternatives themselves be evaluated and their adverse environmental impact be identified and discussed. But subsection (E) has significance independent of its relationship to the EIS. In any action a federal agency undertakes that does not resolve all conflicts over the allocation of resources, it must comprehensively discuss and evaluate alternatives to the proposed action. This subsection is not limited in application to major federal actions that significantly affect the environment as the EIS subsection is.

5. Consideration of International Environmental Effects

NEPA does not limit itself to domestic environmental problems. It also requires federal agencies to consider the international scope of environmental problems. Specifically, agencies are required to

(F) recognize the worldwide and long-range character of environmental problems and . . . lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment.²⁹

Thus, international cooperation in resolving environmental problems is also mandated by NEPA. The only exception to this is any action that would not be consistent with the foreign policy of the United States.

6. Intergovernmental and Public Cooperation

NEPA affirmatively requires federal agencies to assist state and local governmental units and public groups in preserving the quality of the environment. Under section 102(2)(G) agencies are required to

make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment.³⁰

This provision is a mandate for affirmative assistance by agencies in providing information and data concerning environmental problems to other groups. Results and data from research may have to be provided under this requirement. And new technology as it becomes known to agencies must be reported and disseminated to other groups. The provision reflects the congressional attitude that maintenance and restoration of environmental quality necessitates cooperation among all governmental units and the public

generally. This cooperation is more easily achieved with a full and open exchange between the governmental and private sectors of information concerning environmental problems and methods to resolve them.

7. Resource-Oriented Projects

NEPA also requires agencies to "initiate and utilize ecological information in the planning and development of resource-oriented projects." Under this provision agencies must develop necessary ecological information requisite to their planning of resource-oriented projects. This requirement goes beyond mere compilation of available data, to require research in areas where information is lacking. The provision goes further than merely to require the gathering of data; the agency must also use this data in its decision-making process.

8. Cooperation with CEQ

The final procedural requirement of NEPA is for agencies "to assist the Council on Environmental Quality established by subchapter II of this chapter."³² This provision has been interpreted to require agencies to work with the CEQ in the impact statement process. The relationship between agencies and the CEQ was more fully implemented in President Carter's executive order directing the CEQ to issue regulations that would simplify and expedite the impact statement process. These regulations have been prepared and are binding on all federal agencies.³³

Thus NEPA has various procedural mandates for agencies. Although each in some respect is related to the environmental impact statement requirement, they are set forth as separate and distinct responsibilities. Therefore, arguably, failure to comply with any single one separately may constitute noncompliance with NEPA. The relationship of each separate requirement to the EIS process, though, is also significant. With respect to alternatives, for example, courts have held that if the EIS has a thorough and complete discussion of alternatives, subsection (E) is satisfied even though there is not a separate and distinct record of satisfying it.

Treating these requirements separately is quite important. The EIS requirement is limited to major federal action significantly affecting the quality of the environment. But the other requirements under section 102 apply to all agencies and are not limited to particular actions. Hence they directly affect the overall decision-making process of every agency.

The only qualifying language in the Act on these mandates is "to the fullest extent possible." That requirement, however, has not been construed as a limitation or an exception to compliance. Rather it has been viewed as a very narrow justifi-

cation for not meeting the particular mandates of section 102. Specifically, only if "existing law applicable to the agency's operations expressly prohibits or makes compliance impossible" will failure to fulfill the section 102 requirements be excused.³⁴ Those exceptions have been very limited.³⁵ In fact, usually only if the statutory provisions are diametrically opposed to each other will noncompliance with NEPA be allowed.

B. COMPLIANCE WITH NEPA

Although the procedural requirements with NEPA can be succinctly stated, determining what constitutes compliance with them is a more difficult task. As with any statute, determining what NEPA precisely requires and when an agency has met those requirements is an involved process. Under NEPA that process has been dramatically influenced by the judiciary. More so than with most statutes, the judiciary gave teeth to NEPA and made more than just a paper tiger out of it. Discussion and examination of particular judicial decisions will illustrate specific requirements courts have imposed on agencies to comply with NEPA and will identify problem areas in which compliance has been left in the judgment of the agency as well as those areas in which problems remain unresolved. These will be examined next by categories of problems and methods agencies have used to resolve them. Whenever applicable, the discussion will emphasize available Forest Service cases.

1. The Threshold Determination-- Whether to Prepare an EIS

The starting point of the NEPA impact statement process is the initial determination by an agency whether the proposed action requires an EIS. The Act's requirements seem clear. The mandate of section 102(2)(C) is for a federal agency to prepare a detailed statement for "every recommendation or report on proposals for legislation and other major Federal action significantly affecting the quality of the human environment." But what constitutes "major" and "Federal" action and when it "significantly affects the quality of the human environment" is for the agency to decide.

The importance of the initial or threshold determination of whether to prepare an EIS on a proposed project cannot be understood. Failure to file an EIS on a proposed action that requires one typically will result in delayed commencement or completion of the proposed activity. And often in that case the litigation and delay will result in higher cost for the particular project.

The threshold determination is important, however, for reasons other than merely the possibility of error in the determination made. The administrative process for making the initial

determination itself has been subject to close judicial scrutiny.³⁸ Hence it is important for agencies to be attentive to the procedure required in making a threshold determination. Failure to develop an adequate record and procedure for making the initial determination will often result in extensive and costly litigation if the initial determination is not to prepare an EIS.³⁹

These problems may be avoided by an agency adopting procedures to make the threshold determination on any proposed activity which may require an EIS.⁴⁰ Those procedures should lead to a creation of a record that would provide a sufficient basis for the ultimate determination concerning the preparation of an EIS. If the record reflects that the negative decision is a reasonable one, it probably will be upheld by a court. The procedures for the initial determination should also allow sufficient time to gather the necessary data and to compile it and other evidence into a record upon which a decision whether to prepare an EIS could be based. That record should include not only the scope of the project, relevant information concerning environmental impacts, and controversy concerning the project, but also any participation and consultation with the public and other agencies, when relevant. When the decision is to prepare an EIS, the procedures should assure that sufficient time is allowed before commencing the project for preparing and drafting the EIS, for allowing public participation and review of it, for circulating it to other agencies for comment, and for promulgating it in final form.

The initial determination turns in the first instance on an interpretation of the statutory language, "major Federal action significantly affecting the quality of the human environment." Courts have differed both in their interpretation of this language and in their decisions concerning what standard of review should be applied to an agency's initial determination. In interpreting the language some courts have concluded that it establishes a single test that is satisfied if the proposed federal action is either major or significantly affects the quality of the human environment. Other courts, however, have concluded that the statutory language creates a two-pronged test which requires that the proposed action be both "major" and "significantly" affecting "the quality of the human environment." Under either approach if both requirements are met, there is no problem and a decision to prepare an EIS ensues. The hard cases are those where either the action is major but may not significantly affect the environment, which may not implicate NEPA directly, or the action is not major but does significantly affect the quality of the environment, which may necessitate preparation of an EIS.

Usually, though, the threshold determination is resolved in favor of preparing the EIS. Clearly in the case in which the proposed action may be minor but the action will have significant

effects on the environment, a strong argument can be made that the EIS should be prepared.⁴¹ Preparation of an EIS then would further the broad policy of NEPA to protect the environment and minimize environmental harm. This decision is consistent with NEPA's objectives of greater agency concern, attention, and consideration of environmental factors in its decisions. In the other case though, when the project is admittedly "major" but does not significantly affect the environment, the need or usefulness of an EIS is not so great. In fact it may be totally unnecessary and may be merely time-consuming and expensive. At that point a decision not to prepare the EIS may be reasonable.

Some criteria have been developed to assist agencies in determining what constitutes a "major" action. These include the project's total cost, its size, its duration, and its environmental impact.⁴² Also considered are the effects of the project on other related activities and the cumulative impact of the separate factors. Usually no one factor controls the threshold determination, however, and the factors typically are examined in combination with one another.⁴³

For several reasons agencies should resolve the threshold determination in close cases in favor of preparing an EIS. For one thing negative determinations have resulted in much costly and time-consuming litigation. In some cases the courts readily have subjected the agency's threshold determination to close scrutiny.

In these initial determination cases the courts have not agreed on the standard of review to apply to review the agency's threshold determinations. Some courts have viewed the initial determination as basically a procedural, not a substantive problem under the Administrative Procedure Act (APA) and hence subject to review by its "arbitrary and capricious" standard.⁴⁴ Other courts, however, have concluded that the initial determination itself is discretionary but the obligation to prepare an EIS under NEPA is mandatory. According to those courts the decision not to prepare an EIS is a substantive one that must be "in accordance with law" under the APA.⁴⁵ Most Forest Service cases have followed the latter standard and required the negative determination to be "reasonable" in light of the high standards and mandatory requirements of NEPA.⁴⁶

Notwithstanding differences among the courts concerning the standard of review to apply to the initial determination, procedural requirements have been consistently imposed by courts under either standard.⁴⁷ The courts now routinely require that the initial determination be supported by a sufficient record or statement of reasons showing the basis of the decision. That record has been referred to as a "mini-EIS" which in many respects has included much of the actual work that would go into a more comprehensive

EIS. It requires that the environmental impact be identified, the scope of the project be defined, and the adverse environmental effects that cannot be avoided be discussed. A major difference, though, between the record and an EIS is that the record for the initial determination need not be as thorough and detailed as an actual EIS.

The judicial justification for requiring the mini-EIS is to provide an adequate record which would support the agency's determination not to prepare the EIS. Courts have interpreted the EIS requirement as a mandatory one that does not lie within the sole judgment of an agency. Hence the courts have required that the agency maintain an administrative record which is adequate to provide a basis to evaluate the reasonableness of a determination not to prepare an EIS. Similarly, according to the courts, a statement of reasons for a negative determination should demonstrate that the agency has given adequate consideration to the problems and that the agency understands the proper statutory standards. It also provides the court with a focal point for review of the agency's negative declaration in light of the agency's expertise.⁴⁸

This record requirement in negative determination cases argues in favor of preparing an EIS in close or controversial situations. First, the more controversial the situation or the closer the issue concerning preparation of the EIS, the more detailed or comprehensive the record for the threshold determination would have to be.⁴⁹ Second, if done properly the record prepared for the threshold determination would contain much of the groundwork necessary for the EIS and could easily be expanded into the more comprehensive, detailed EIS. If the initial work has been thorough, the EIS may be prepared fairly quickly, and the project may not have to be delayed for an unreasonable amount of time. And of course the decision to prepare the EIS will avoid the delays that would be inherent in litigation to review the negative determination.

Other reasons exist why the threshold determination, particularly in close or controversial situations, is usually resolved in favor of preparing the EIS. The courts have played a significant and unique role in implementing NEPA. They have given a very expansive reading to the protective quality of NEPA and readily impose the EIS requirement on agencies. This has been particularly true in instances where the proposed action would clearly significantly affect the quality of the environment. Similarly the CEQ, which was created by NEPA and directed to guide its implementation, adopted final guidelines which suggest that in any case where doubt exists concerning preparation of an EIS, those doubts should be resolved in favor of preparing the EIS. In fact, the CEQ final guidelines states that, if a project is "controversial," an impact statement should be prepared.⁵⁰ Similar provisions are contained in the final CEQ regulations that have been issued to

all agencies pursuant to President Carter's Executive Order.⁵¹ The purpose of both the courts and the CEQ has been to carry out the spirit as well as the letter of NEPA as an environmental protection statute.

For various policy reasons an agency might also conclude that the initial determination usually should be resolved in favor of preparing an EIS. Favorable relations with its constituents, the public, and the Congress can be attained by opening the decisionmaking process to greater public involvement. This is especially true when the objectives of environmental protection are being furthered. In addition, the EIS process has positive aspects for the agency that should not be overlooked. An agency like the Forest Service that has various planning responsibilities under several different statutes may find it useful to coordinate those statutory requirements in a single document. Rather than using a piecemeal approach to satisfying various statutory mandates by dealing with each statute in a separate document, it may be faster and cheaper to consolidate consideration of those requirements in one document. Thus if a particular proposed project is going to require several plans and consideration of several statutes and separate reports, proceeding with an EIS may be advisable even though an EIS may not otherwise be required. By doing the EIS various factors required to be examined under the statutes, particularly the environmental ones, would receive fuller consideration and treatment than they might otherwise receive in separate documents. All pertinent factors are also coordinated in a single document for the decisionmaker to use in making the decision. Last, the EIS process allows fuller public participation and inter-agency cooperation than might otherwise be used.

The Forest Service procedure for making the threshold determination whether to prepare an EIS on a proposed activity recently has caused litigation. The basic procedure is set forth in the land use planning section under Title 8200 of the Forest Service Manual. The basis for determining whether an EIS is required on an activity is the environmental analysis report (EAR). The EAR is intended to incorporate the requirements for both Multiple-Use Sustained-Yield Act and NEPA. In addition to opening up the decision-making process to greater visibility and standardizing the process, the EAR is intended to determine the need for an EIS. Its contents track very closely the statutory requirements of NEPA. The Forest Service has used the EAR to justify negative determinations and to provide a statement of reasons supporting a negative determination.

An early Forest Service case, Wyoming Outdoor Coordinating Council v. Butz,⁵² illustrates some problems the Forest Service has in using the EAR as the justification for a negative determination. In that case the Forest Service had determined that an EIS was not necessary on a proposed

timber sale, notwithstanding that the timber would be removed by clearcutting. The negative determination was based on an EAR that had been prepared for a multiple use assessment as well as for a determination of whether it was major federal action requiring an EIS under NEPA. The trial court upheld the Forest Service negative determination that the sale was not major federal action significantly affecting the quality of the environment. It denied injunctive relief.

On appeal, the trial court was reversed. The appeals court first disagreed with the trial court on the applicable standard of review. It held that the arbitrary and capricious standard of the trial court was inappropriate and that the one to be applied is whether the Forest Service determination was in accordance with law, i.e., that it met the high standards imposed by NEPA. The decision had to be reasonable, "in light of the mandatory requirements and high standards set by the statute so as to be 'in accordance with law' and--another ground of review in section 706(2)(A) which may be applied consistently with the procedural demands of NEPA."⁵³ Applying that standard the court concluded that the negative determination was wrong and that the timber sale required an EIS.

Kelley v. Butz⁵⁴ also reflects a situation in which the Forest Service used its multiple use environmental analysis to justify a negative determination. In that case the Forest Service had determined that an EIS was not required for spraying three separate small areas of the Ottawa National Forest. The court examined the Forest Service's environmental analysis procedure as well as the CEQ guidelines concerning negative determinations. The court concluded that these embodied the procedural requirements which, if satisfied, would meet the requirements for a negative determination.

The Kelley court noted that the environmental analysis basically required each of the same considerations be entered that would be undertaken in an EIS. However, the court found that the environmental analysis was inadequate. It concluded that, as applied, the environmental analysis failed to examine the specific objections to the proposed spraying and resolutions of those objections. Moreover, the environmental analysis failed to consider alternatives to the project or to discuss how the alternatives could avoid objections raised by the public or lessen significant environmental impacts.

The court also noted that the analysis incorporated by reference an earlier report on spraying in the national forests which did deal with alternatives and cost factors. The court held, however, this was inadequate for the negative determination on the three small areas being examined here. It determined that there was no direct application of the information in the more general report to the specific area under consideration in the environmental analysis. Hence even the requirements of the Forest Service were not met.

The court concluded that failure to include these factors rendered the environmental analysis insufficient to support the negative determination under NEPA. Hence, the Forest Service's decision not to prepare an EIS based on insufficient analysis could not be upheld. The court did not require that an EIS be prepared, but did require the Forest Service to do an adequate environmental analysis to support the negative determination. The court did vote also that if the procedures set forth in the Forest Service Manual were satisfied, they seemed to comply with the requirements of NEPA for a negative determination.

Another case being considered at the same time as Kelley was Wisconsin v. Butz⁵⁵ which dealt with spraying of certain sections of a national forest in Wisconsin. In Wisconsin a preliminary injunction was sought to enjoin any spraying until an EIS was made. The Forest Service concluded that an EIS was not required based on its environmental analysis which incorporated several reports on herbicides. The court found that the reports were available in the Regional Forester's Office but were not published in the Federal Register nor sent to the Wisconsin officials. After making express findings of irreparable harm from the use of pesticides on wildlife and wildlife habitats, on food supply in the area, and on the recreational use of the forest to be sprayed, the court concluded that an EIS was required.

More recently in Jette v. Bergland⁵⁶ the Forest Service environmental analysis procedure was under judicial scrutiny and again failed to be acceptable. In Jette Exxon had been attempting to undertake exploratory activities to determine if copper mining could be conducted. The company had been granted a special use permit and had been developing the claims since 1972.

In Jette the appeals court directly attacked the Forest Service EAR process. The court stated that the Forest Service used a process to delay preparation of an otherwise required impact statement. It noted that work on developing the mining claims had gone on for several years without any report by the Forest Service. The court also criticized the EAR process as a standardized means to avoid preparing an EIS. After examination of the EAR, the court noted that the report does not constitute a NEPA impact statement. In the court's words:

Rather it [the environmental analysis report] appears merely to create another layer of bureaucratic paperwork while the activity which damaged the environment goes on. The question whether an impact statement was appropriate should have been considered at the outset by directly evaluating the magnitude of the operation in terms of statutory standards and not by way of the preparation of this

Environmental Analysis Report, which is the invention of the Service.⁵⁷

The court went on to state that NEPA imposes the obligation on an agency to prepare an EIS or make a determination that one is not needed. It is insufficient, according to the court, for an agency to undertake procedures designed to avoid coming to grips with that question.

The court then relied on its earlier decision in Wyoming Outdoor Coordination Council⁵⁸ and, noting the factual similarities, stated that the situation could require preparation of an EIS. The case was remanded to the trial court for a factual determination of whether an EIS was required. The trial court had not reached this decision because it had avoided the NEPA question by holding that the plaintiffs failed to exhaust their remedies.

Friends of the Earth, Inc. (FOE) v. Butz⁵⁹ raised issues concerning not only the use of the EAR to support a negative determination but also the issue whether an agency may divide its activities into three categories: (1) no EIS required, (2) EIS is required, and (3) EIS may be required. In the FOE case the court reviewed the EAR and concluded that it did provide a sufficient administrative record and statement of reasons to review the Forest Service's negative determination.

First, the court rejected the plaintiffs' argument that public notice of a negative determination had to be given. The court said that that was neither a statutory nor administrative procedural requirement. The court also dismissed arguments that the EAR did not discuss all secondary consequences, appropriate alternatives, and mitigating measures, that it makes unwarranted assumptions, and that it contains conclusionary statements. The court stated that the EAR was sufficient if under the rule of reasonableness, it contained adequate information which even may be conclusionary and not thoroughly discussed.

The court then reviewed the EAR that had been prepared for the exploratory mining operation. It concluded that the EAR was an adequate reviewable record and that the determination that an exploratory mining operation was not a major federal action significantly affecting the environment within the meaning of NEPA was reasonable. Hence summary judgment for the Forest Service was granted.

Unfortunately, although FOE was appealed, the issues concerning the EAR and the negative determination were never decided conclusively. The case was remanded as moot because the exploratory activities struck water and were concluded while the appeal was pending.⁶⁰

The trial court had noted, without any evaluation, that the Forest Service NEPA guidelines separate proposed actions into different categories:

one category being actions which always require an EIS, the second being action that never would, and the third being activity that may require an EIS depending on a reasonable decision by a responsible official. This categorizing raises serious questions under NEPA. Basically the question is whether certain activities can be declared exempt from the NEPA EIS process. Issues raised by general exemptions include whether an adequate record had been prepared to sustain the general negative determinations, whether an adequate record with the statement of reasons must be prepared for each exempt activity, and whether the general negative determination is reasonable. FOE did not resolve these questions. The trial court did indicate that the categorizing was permissible, but each activity must be reviewed on its merits on an ad hoc basis.⁶¹

Several other cases have raised questions about the advisability of general categories that are exempt from the NEPA process. Statements by the courts indicate some of the reasons why such categories may be inadequate. The language, "every recommendation or report on proposals for legislation and other major Federal actions,"⁶² may require the analysis for a negative determination be applied to each proposal individually. Impact statements have been required if the project may cause or could have a significant effect on the environment.⁶³ Moreover, decisions not to prepare an EIS are looked at closely by courts.⁶⁴ Those decisions should be based on more than unsupported conclusions about the magnitude or frequency of potential effects. Negative determinations should not be based on superficial reasoning or perfunctory analysis.⁶⁵ Similar principles might apply to general exclusionary categories. If the reasons justifying the exclusions are evident and applied to each of the activities in all circumstances, the categorical exclusion might be appropriate. But without such application, then a general categorization may be improper.

Other issues in categorical exclusions from the EIS process are matters concerning controversial projects. Arguably when substantial questions have been raised as to whether a project will have significant adverse impact, an agency should be hesitant to decide that an EIS is not required, particularly if no preliminary studies have been done.⁶⁶

Likewise, because individual situations could differ, it may be equally as bad to make a blanket declaration that an EIS is required in certain categories of cases. Although there may be activities that usually will have significant adverse environmental effects, nonetheless individual study may reveal particular projects would not require an EIS.⁶⁷ One problem with an agency setting aside particular categories of activities regarding application of the EIS requirements is simply that it becomes

"agency procedure" by which the agency will subsequently be bound. If the agency subsequently deviates from those guidelines or categories on an ad hoc basis, it may be subject to the challenge in court that it did not adhere to its own prescribed internal procedure.⁶⁸

The final problem with general categories for negative determinations is the type of record that might be necessary. As noted, courts have required a record or statement of reasons concerning negative determinations. It is questionable whether a statement that the activity falls within a general category that is excluded by a prior action will be sufficient justification for the negative determination.

The courts have scrutinized threshold determinations very closely. Usually courts require that an agency do sufficient investigation and data gathering to allow it to consider realistically and in an informed manner the full range of the potential effects from the proposed action.⁶⁹ The administrative record is a device the courts use to assure that the agency has followed correct procedure. It must affirmatively appear from the administrative record that the agency has given thoughtful and reasoned consideration to all the potential effects of the proposed action, and that a convincing case has been made that the proposed impacts are insignificant after careful balancing of the relevant factors.⁷⁰ Without that analysis and record it may be difficult for courts to determine whether the agency has complied with the NEPA mandate.⁷¹

A special problem is presented with the Forest Service in using the EAR and its process to satisfy the NEPA negative determination requirements. The EAR process arose out of the need for a multiple use assessment under the Multiple-Use Sustained-Yield Act of 1960. The process is designed to identify the multiple use objectives for a planning unit and forest. Alternatives are examined under that process to determine how effective each is in satisfying the stated objectives. In deciding which alternative is best suited for multiple use objectives, the various options may not be subjected to the close scrutiny for their environmental impact that is required under NEPA. The alternatives may not be examined for their adverse environmental impact and, specifically, to determine whether the alternative causes a significant environmental impact to support a negative determination. Moreover the resolution of particular environmental concern in selecting objectives may not be thoroughly discussed. It is critical that the record or statement of reason justifying the negative determination evidence that the environmental impact of the alternatives was analyzed and was supported by adequate data and that the objections to the record were resolved. With a sufficient data base to support it, a thorough presentation of alternatives and their impact, and mitigation efforts, the EAR could provide a sufficient basis for a court to conclude that the negative determination was in fact reasonable.⁷²

The final CEQ regulations on implementing NEPA procedures clarify some of these problem areas. The new regulations clearly indicate that categorical exclusions from the EIS process are acceptable.⁷³ The CEQ regulations require agencies in their NEPA implementing regulations to identify those actions which would not normally require an EIS. Similarly, the agency's implementing regulations must identify those actions which normally do require an EIS. The third category are those actions which would require an environmental assessment but not necessarily an EIS. In describing the contents of these environmental documents, the CEQ regulations are clear that the agency must provide sufficient data, consideration of alternatives, and analysis of the project to justify a negative determination.⁷⁴

The CEQ regulations leave room for individual situations in which an EIS may be prepared on an ad hoc basis even for cases within the categorical exclusions. The CEQ regulations define "significantly" in terms of both the context of the project and the intensity of its impacts. Various measuring factors are included under intensity such as the unique characteristics of the area, the action's effect on public health and safety, if its effects will be highly controversial, and its cumulative effects. Thus under the CEQ regulations, categories may be established by agencies, but the categories should not be treated as absolute. Even within a category a situation may arise requiring or not requiring an EIS depending on the environmental assessment of the particular situation.

2. The Program EIS

Once the initial determination to prepare an EIS is made, the extent or scope of the EIS becomes a problem. The decision to prepare an EIS is based upon a finding that there is proposed action requiring the preparation of the statement. Some action presents no serious problem concerning the EIS. If the proposed action is merely granting a grazing permit, for example, the EIS would be limited to that activity and the area which it would affect. If the proposed action is granting several permits or licenses over a large geographical region,⁷⁶ or carrying out a major federal program,⁷⁷ or recommending a legislative program,⁷⁸ more difficult issues may be involved. Some projects are undertaken in phases or parts and completed in that manner. Others involving land management problems may require several individual licenses within a particular area or region to develop or remove the resources from the area. In other instances the agency's action may be undertaking a research and development program of contracts with universities and private parties to develop particular technology or methodology for later use.

The problem concerning the scope of the EIS is whether an EIS must be prepared on the total

program or merely its individual parts. The decision concerning the scope of the EIS is a crucial one. If an agency prepares an individual or separate EIS on parts or phases of a project which a court determines requires evaluation as a whole, the project will be delayed until a comprehensive EIS is prepared. Contrariwise, the agency may spend more time and money than is necessary if it is preparing a comprehensive or program EIS on an activity that only requires an individual or separate EIS. Hence it is useful to examine the basis the courts applied to resolve the question.

The program or comprehensive EIS has been required if the component parts of a project are inter-dependent,⁷⁹ if the individual EIS would not adequately inform the decisionmaker of all the environmental impacts of the proposed project,⁸⁰ if the responsible agency is segmenting a project into smaller units for environmental assessment to avoid disclosing the cumulative adverse environmental impacts of the activity,⁸¹ or if the related actions will have a cumulative or synergistic environmental impact on a region.⁸² On the other hand, an agency's decision to prepare a program EIS has been rejected if the programmatic statement does not adequately consider site or project specific factors.⁸³ The agency proposing the action must decide initially whether a program or individual EIS is required.⁸⁴

Several reasons have been given for requiring a program or comprehensive EIS. A major objective of NEPA is to provide the responsible decisionmaker a full appraisal and assessment of the environmental consequences of the decision to prevent irretrievable commitments of resources and permanent damage to the environment.⁸⁵ When an activity contains several specific projects or different actions that produce various environmental impacts, for example, due to geographic variations, those impacts cannot be assessed properly in individual impact statements. Similarly, segmenting a project into component parts may avoid identifying certain environmental impacts that would remain undocumented and unavailable to the decisionmaker. Likewise, segmentation may avoid showing the inter-relationship between the various parts of the total activity. When that occurs, a full assessment of the project is not being given to the decisionmaker.⁸⁶

Another reason for requiring program EISs is to avoid an agency breaking a project into small enough units that do not have significant environmental effect and hence might not require an EIS. Allowing that type of division would avoid full disclosure of the potential environmental impacts to the public required under NEPA as well as avoid bringing that information to the attention of the decisionmaker.⁸⁷ A program EIS provides complete information to the public and the decisionmaker of the impacts of the entire program, including bringing attention to the fact that the project's cumulative effects could be more severe than the impact of each separate part.⁸⁸

The last reason for requiring program EISs is that federal action may cause cumulative or synergistic impacts on a region.⁸⁹ These impacts could be felt even without a comprehensive federal program. When an activity has broader impact, the site-specific EIS may be inadequate to inform the responsible decisionmaker fully of the environmental consequences of the decision. This is especially true if the individual EIS does not develop the cumulative environmental effects of the project because of its segmentation.⁹⁰

Determining whether an activity will require a program EIS is basically a factual determination for the responsible official within the agency.⁹¹ Unfortunately there is no litmus test to be applied to resolve that issue. Hence, merely because an activity is denominated a "program" by the agency does not automatically trigger the program EIS process.⁹² The existence of the program is a fact, indeed a significant one, in making the required determination, but not a conclusive one. A program EIS might in some circumstances be impracticable because of countervailing factors and policies.⁹³

In determining whether to proceed on an individual or program EIS basis the agency must examine several factors. The cumulative, as well as the isolated, environmental impacts of the project should be studied and compared. The magnitude of the project, the inter-relationship of the components to the total project, the geographic boundaries (local, regional, national) of the project, and the area to be affected by the project should also be examined. Whether an individual EIS can encompass the same items in as much detail as would be included in a program or comprehensive EIS is another relevant factor.

Courts have not enunciated clear tests to determine whether a separate or comprehensive EIS is required for federal actions. Each case has typically been decided on an ad hoc basis and limited to the facts of the particular case. The courts have considered the reliability of available information concerning the project and its impact.⁹⁴ The ease with which the project can be broken into isolated parts is also relevant. How far the project has progressed to completion is another factor looked at by the courts. Whether it is practical to review already completed segments of a project independently is a pertinent inquiry.⁹⁵ Do the separate parts of a project lend themselves to physical and biological isolation for purposes of study in an independent, separate environmental evaluation? Is there available data upon which to base a program or comprehensive EIS? In part the latter question requires that the area affected be well-defined and the impacts be identifiable.⁹⁶

Courts have advanced two tests to assist in determining whether the components of a proposed activity are inter-dependent, constituting an integrated program or plan. Both tests emphasize analysis of the specific, separate actions or projects which compose the overall program. From consideration of them it can be determined whether a separate, individual EIS is sufficient or whether a program and comprehensive EIS would be required.

The "coercive effect" tests means that if the completion of one phase of a project logically requires the completion of the next phase, the phases are inter-dependent.⁹⁷ Interstate highway projects provide examples of this situation. If one section of the interstate highway does not terminate at a logical point such as a town, then the next segment of the highway must be built so that the first will be functional. Completion of the first segment "coerces" the development of the subsequent ones. Obviously this test applies only if the activity contemplates additional or sequential action.

The "nexus" or independent utility test turns on the inter-relationship of the parts of a major program to the total project. For example, if an agency undertakes a major water resources project which has several parts, the independence of those parts is critical. If the parts can stand alone as completed and serve substantial local purposes independent of completion or other parts of the project, a program EIS will not be required. The focus is on whether the separate parts of the project will have independent utility or whether they only have value as they tie into other segments of the project.⁹⁸

In applying these tests to determine the need for a program EIS, the courts have been attentive to practical considerations of both time and money that confront agencies. Other practical difficulties for agencies in preparing the program EIS include (1) the impossibility of determining all future alternatives due to the time lag between construction and operation (crystal ball gazing);⁹⁹ (2) the difficulty of analyzing all the specific projects within a massive, million dollar program;¹⁰⁰ (3) the project's nearing completion, not in implementation stages;¹⁰¹ and (4) the lack of a factual predicate on which to base a program EIS.¹⁰² Based on these and similar factors criteria can be established for a planner to determine that, because of the cumulative effects or the large area impacted, a project requires either a program or an individual EIS.

Resolving the issue of the scope of the EIS to be prepared for a proposed project is not easy. The Forest Service, in particular, may be confronted with instances in which it is a relevant issue. In one case a program EIS was required on future timber sales proposed by the Forest Service.¹⁰³ Other activities of the Forest Service involve large areas of land and projects or activities which can be divided into component parts. In addition, much planning is done at various levels,

including the local, regional, and national levels. Moreover, the ramifications of some activities are not immediately felt. An example of this is the Renewable Resource Assessment and Program under RPA/NFMA. An initial question is whether an EIS is required, and then, if so, whether a program or individual one will be required. To the extent that the Assessment is merely data-gathering and inventorying, an EIS may not be necessary. If it does not propose action or constitute a recommendation for action, the detailed statement under NEPA is not necessary. Clearly, if the Renewable Resource Assessment is limited to statements of policy and guidelines without proposing any recommendations or actions, no EIS is required. Policy statements and guideline determinations, without more, are not "major Federal action" under NEPA. However, if the Renewable Resource Assessment or Program sets output levels and recommends action, an EIS clearly would be necessary.

However, if the Assessment is in effect setting guidelines and goals for output levels (locally, regionally, or nationally) or making recommendations for action or legislation, the EIS may be required. Determining then whether an individual or program EIS or both should be prepared under NEPA is a complicated issue. One difficulty is that under RPA/NFMA the policy guidelines and objectives set forth in the Renewable Resource Program are to be implemented by land management plans.¹⁰⁴ Hence the federal action that is being recommended or proposed may occur at the local, rather than the national, level. The EIS at that level might be a broader one related to the national considerations which lead to the recommendations in the Renewable Resource Program. The EIS prepared on the land management plans that actually implement the program would not have to be as extensive in scope and would not have to duplicate the work contained in the national program EIS. It is important to avoid linking an independent, individual project EIS to a broader program EIS. If the program EIS encompasses the separate components, action on them may be delayed until all the data and evidence is gathered for the comprehensive EIS if the agency has combined them.

The Forest Service's use of a program EIS to support its second Roadless Area Review and Evaluation (RARE II) came under judicial scrutiny in 1980.¹⁰⁵ The Forest Service concluded the RARE II study in 1979. RARE II examined all the areas nationwide on NFS lands that met the minimum statutory requirements for wilderness. The RARE II areas were separated into three categories: wilderness, nonwilderness, and further study. The wilderness and further study designations were not challenged because they did not propose any action yet for which NEPA had not been met. The state did contest the nonwilderness designations.

In California v. Bergland¹⁰⁶ the state challenged the selection of areas for nonwilderness,

that is, areas open for development and multiple uses other than wilderness. The state argued that the use of a program EIS precluded consideration of site-specific environmental factors essential to wilderness evaluation. The state also contended that the environmental effects of removing land from wilderness study was not adequately considered in the EIS. The state claimed further that the program EIS gave inadequate consideration to the alternative of more wilderness areas. According to the plaintiffs, the alternatives examined in the EIS were basically predevelopment, with no actual wilderness alternative.

The Forest Service responded by defending the program EIS. It argued that the no action alternative was essentially a wilderness alternative. Moreover, it argued that the RARE II was not federal action requiring a site-specific EIS. According to the Forest Service the RARE II merely contained recommendations for wilderness designations by Congress, but did not propose or implement any plan or course of action. It was the first step in the total planning process. The individual areas would be considered when the land management plans required under NFMA were prepared and particular development proposed. At that time, the Forest Service argued, the site-specific EIS would be prepared for the land management plan.

The federal district court agreed with the plaintiffs and rejected the arguments of the Forest Service.¹⁰⁷ The court concluded that the program EIS did not adequately consider the wilderness alternative for the areas designated non-wilderness. Moreover, it found that because RARE II did constitute major federal action with respect to the nonwilderness designations, an EIS was required. The court found the program EIS inadequate to support the Forest Service's conclusions. The court also concluded that greater public participation in preparation of the final EIS should have been allowed by the Forest Service.

According to the court, the no action alternative was not a wilderness alternative.¹⁰⁸ The court noted that some areas were already under management plans which would not maintain them in their natural condition. Moreover, the no action alternative did not provide any affirmative protection to an area that would be required for those designated wilderness. In addition, under applicable law and regulations the no action alternative precludes further consideration of the area as wilderness.

The court was especially concerned that the nonwilderness designation would lead to destruction of the wilderness values without first considering those values in each RARE II nonwilderness area. The court identified three impacts on wilderness values from a nonwilderness designation.

First, management planning will not consider mitigation measures that might minimize the impact of development upon the wilderness characteristics of an

area. Second, and most obviously, the areas will not enjoy the affirmative protections of wilderness classification. Third, however, the opportunity for wilderness classification will be permanently foreclosed on many of the areas because development activities will change the nature of an area to the point that it will no longer meet the minimal criteria for inclusion in the wilderness system.¹⁰⁹

The court concluded "that the Forest Service either never seriously considered the impact of its decision on the wilderness qualities of the RARE II areas, or that the Forest Service has simply failed to disclose the data, assumptions, and conclusions employed by it in such a consideration."¹¹⁰ According to the court, the RARE II EIS indicates to Congress and the public the conclusions that have been made and that the Forest Service is ready to act on them. It does not adequately explain or describe how the RARE II areas will be developed or what will be the effect of that development. The EIS also does not explain why the wilderness values are being relinquished.

The court enjoined the Forest Service from any development of the disputed areas in California until an adequate EIS is prepared under NEPA. In its opinion the court expressly reserved any decision on the compliance with NFMA and MUSY because of the violation of NEPA.¹¹¹

The CEQ final regulations deal with the program EIS problem by considering whether proposals or their parts are closely enough related to be treated as a single course of action.¹¹² If so, a broader EIS may be required even if the project is being undertaken by more than one agency. Included are broad federal actions such as the adoption of new agency programs or regulations. The regulations suggest three ways to evaluate these actions, either geographically, generically (actions having relevant similarities such as "common timing, impacts, alternatives, methods of implementation, media, or subject matter"), or by stage of technological development. The last category includes research and development programs for new technology which, if applied, would significantly affect the quality of the human environment.

3. Delegation of Authority

NEPA, in section 102(2)(D), now contains authority for the delegation of EIS preparation to other agencies. Under the amendment to NEPA,¹¹³ delegation was authorized to state agencies having statewide jurisdiction that were involved actively in projects related to the federal activity. The specific problem had arisen because some agencies such as the Department of Transportation were, in effect, conduits for federal funds to carry out a project rather than the agency actually instigating or

implementing the project. The courts, under strict interpretations of NEPA, effectively had stopped all interstate highway construction in some states by prohibiting the state highway departments from preparing impact statements.¹¹⁴

Under the amendment to NEPA, state agencies may, in fact, prepare the EIS. But the new amendment requires, nonetheless, that the responsible federal agency exercise independent judgment and evaluation of that EIS. In fact, arguably, the EIS must be compiled by the federal agency. Likewise the amendment still requires the coordination with other federal and state and private organizations. Under the amendment the responsible federal official must provide guidance and participate in the EIS preparation. Independent evaluation must precede approval and adoption of the EIS by the federal agency. Hence the duty to prepare, and responsibility for the contents of, the EIS still remain with the federal agency.

Section 102(2)(D) is relevant for the Forest Service because so many of its activities are pursuant to cooperative agreement or contracts with either states, universities, or private organizations. In most instances preparation of an EIS should rest with the agency and actually be carried out by the Forest Service personnel. When outside work is undertaken, it should be evaluated and compiled by the agency. Agency evaluation has been required in order to avoid biases from special interest groups or other organizations being reflected in the material presented.¹¹⁵ For example, a licensee would be expected to prepare a favorable EIS concerning the license activity. The impartiality and objective judgment must be made by the agency¹¹⁶ and evidenced in the EIS provided in the decisionmaking process.

4. The Lead Agency

NEPA does not state clearly which federal agency must prepare the EIS. Although the Act is clear that the EIS must be prepared by the federal agency and not applicants or other third parties, it does not state which agency must prepare the statement if more than one is involved on a proposed project. This problem arises in many contexts. For example, the proposed project may cover federal land under the jurisdiction of more than one agency, or it may involve a permit or license from another agency, or it may be an action undertaken jointly by two or more agencies. Or the action may involve carrying out a presidential program that will eventually affect several agencies. In those situations NEPA does not indicate which agency has the responsibility for preparation of the impact statement.

To resolve this dilemma the courts have followed the "lead agency" concept delivered by the CEQ.¹¹⁷ Under this concept the agency which is primarily responsible for instigating or commencing a plan for the project itself must prepare

the EIS. This does not necessarily turn on the contribution of that agency to the total project nor does it require that the agency be involved throughout the duration of the project. Rather it emphasizes the fact that agency's activities are the first step in carrying out the proposed action which is subject to the EIS requirement under the Act. It also emphasizes that the EIS should be prepared early in the planning stages so that the environmental factors receive full and thorough treatment throughout the project. In the cases where the lead agency may not carry primary responsibility throughout the duration of the project, the EIS preparation may be shared with other agencies that will be involved. The significance of being the lead agency, however, is that the agency has the ultimate responsibility to be sure that an adequate EIS for the entire project is prepared and that the procedures surrounding it have been carried out.

The CEQ final regulations expedite and simplify determination of the lead agency.¹¹⁸ The regulations establish a procedure to determine which agency will supervise preparation of an EIS for actions involving more than one agency or for a group of actions that are related to each other because of their functional interdependence or geographical proximity. Under the regulations at least one federal agency must act as a joint lead agency on projects involving state, local, or other federal agencies. The regulations require the involved agencies to determine by letter or memorandum which shall be the lead agency and which shall be the cooperating agencies. The agencies must resolve the lead agency question without causing delay. Factors to be considered to resolve any disagreement over the lead agency determination are:

- (1) magnitude of agency's involvement;
- (2) project approval/disapproval authority;
- (3) expertise concerning the action's environmental effects;
- (4) duration of the agency's involvement;
- (5) sequence of agency's involvement.¹¹⁹

The regulations also authorize any federal, state, or local agency or private persons substantially affected by a non-designation to submit a written request to a potential lead agency for a lead agency determination. If the agencies are unable to agree on a lead agency designation or the procedures do not determine within 45 days a lead agency determination, any concerned agencies or persons may file a request with the CEQ asking it to determine which agency shall be the lead agency. The procedures require a notice of the lead agency determination request to all concerned agencies and opportunities to respond from each. The CEQ must then determine which federal agency shall be the lead agency, as soon as possible and not later than 20 days after receiving all responses.¹²⁰

5. The Scoping Process

After an agency has decided to prepare an EIS, the CEQ final regulations require the agency to undertake the scoping process. "Scoping" is the means by which the agency determines the scope and the identity of significant issues to be covered in the EIS on a proposed action.¹²¹ Scoping must be used early in the EIS process and must be open. The lead agency must invite participation in the scoping process from federal, state, and local agencies, affecting Indian tribes, proponents and opponents of the action, and other interested persons.

In the scoping process the agency must determine the significant issues to be analyzed in depth in the EIS.¹²² The agency must also identify issues which are not significant or have been covered by a previous environmental review. Those issues do not have to be discussed in depth; a brief statement in the EIS telling why they will not have a significant effect on the human environment or referring to their coverage elsewhere will be sufficient treatment. During scoping the lead agency also must make assignments among cooperating agencies for preparation of the EIS, always retaining principal responsibility for the EIS with itself. The agency must also indicate any public environmental assessments or other EIS which are being or will be prepared that are related to but not part of the scope of the EIS being prepared.

The scoping process is also when the agency must indicate the timeframe for the preparation of the environmental analysis and the agency's tentative planning and decisionmaking schedules. In addition, the agency may set page limits on environmental documents and time limits for the EIS process. The agency also may adopt procedures to combine its environmental assessment process with its scoping process.

Through the scoping process the CEQ final regulations may expedite the EIS process. The scoping process will delineate and identify the significant issues requiring fuller discussion in the EIS. Those issues that are not significant or have been covered adequately elsewhere in other impact statements may be merely referred to briefly in the EIS. In an effort to save preparation time, to reduce the size and bulk of EISs, and to minimize duplicative work, the CEQ final regulations urge agencies to incorporate by reference other federal and state EISs and studies into their own EISs.¹²³

C. CONTENTS OF THE EIS

Although the statutory requirements of the EIS can be stated briefly, determining precisely what the EIS must contain is not as easy. Clearly Congress was not content merely to leave to the judgment of an agency what the "detailed statement" should include. Courts have used the specific content requirements for the EIS as indicating

congressional intent to provide a procedural means or device by which the objectives and major purposes of NEPA can be achieved.¹²⁴ It is through the EIS that the environmental full disclosure goal of the Act is attained. In short, the drafters of the EIS should attempt to gather all the data and options regarding environmental effects for the attention of the decisionmaker. This will enable the decisionmaker to be cognizant of adverse environmental impacts, ways to minimize those impacts, and mitigation measures and other options available to avoid them completely.

Courts have not required that the drafter of the EIS or the agency itself be totally impartial and totally disinterested in the proposed project.¹²⁵ Rather the courts emphasize that the EIS itself must reflect that the environmental factors are treated fairly and that whatever biases may have existed were neutralized in the preparation and presentation of the document. This neutral approach requires more than pro forma, mechanical compliance with NEPA's EIS requirements.¹²⁶ In other words, courts are aware that in some instances the agency that is required to prepare an EIS may be a "program" agency, mandated by law to further a particular activity or perform a specific function. In passing NEPA Congress did not intend that these agencies forget their basic structure and purpose of existence.¹²⁷

1. Alternatives

One of the first problems in preparing the EIS is determining precisely what alternatives must be discussed and in what depth. According to the CEQ final regulations the alternative section is "the heart of the EIS."¹²⁸ NEPA itself only indicates that alternatives to the proposed action must be identified. However, courts have interpreted this to require not only identification of the alternatives, but also discussion and analysis of their adverse environmental impact.¹²⁹ The requirement of more in-depth treatment of alternatives than merely identifying them arises from the statutory description of the statement itself as "detailed" and from an interpretation of section 102(2)(D) (now subsection (E)) of NEPA.

Specifically, section 102(2)(E) requires study and consideration of "appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources."¹³⁰ This requirement to study, develop, and assess the environmental risks of alternatives is independent of the EIS discussion of alternatives. It applies whenever a proposed action involves unresolved conflicts concerning different uses of available resources whether the proposed action is major and significantly affecting the environment or not.¹³¹ Because this independent requirement to consider alternatives

is in addition to their treatment in an EIS, courts almost uniformly have demanded that analysis of alternatives in an EIS be very thorough. However, the paragraph E requirement does not have to be satisfied apart from the EIS when one is required. Compliance with the EIS alternatives requirement can meet the mandate of paragraph E.¹³²

The courts also have adopted a "rule of reason" to determine which alternatives should be included in an impact statement.¹³³ That is, all reasonable alternatives must be included. Several factors have been suggested as guidelines to assist agencies in determining what are reasonable alternatives. One is that speculative or strictly hypothetical alternatives do not have to be discussed.¹³⁴ If the technical data for an alternative is incomplete or research regarding it is inconclusive so that no reasonable conclusions may be drawn from it, then the agency is not required to speculate on the eventual technology that might be developed.¹³⁵ Another factor to be considered is the time frame for the proposed action. Alternatives which would not affect the project in its time frame do not have to be considered. If the technology or alternative will not be available or developed during the time frame of the proposed action, it may be omitted.¹³⁶ The important thing here is to provide the decisionmaker with relevant data about viable options.

However, alternatives cannot be excluded simply because the means of implementing them are beyond the control of the agency that is undertaking the proposed action.¹³⁷ Those alternatives, if viable, need to be discussed because the decisionmaker may choose to defer to other agencies that could implement the alternative. But in order to do so those alternatives must be brought to the decisionmaker's attention.

An alternative that must be discussed in every EIS is that of not doing the project at all.¹³⁸ This alternative in turn has led to a major problem in developing the alternatives section of the EIS. The problem is to avoid a mechanical approach to the preparation of an EIS. In some instances an EIS can become quite perfunctory with respect to alternatives if the drafter simply adopts the expediency of identifying the two extremes, the maximum action and no action. The last step would be the selection of one of the alternatives in between the extremes. This approach may be contrary to the good faith objectivity required in the preparation of an impact statement.¹³⁹ Courts in reviewing the adequacy of an EIS are wary of an EIS that has been drafted mechanically. That is, the EIS may be inadequate if it is conclusionary and not a good faith effort by the agency to identify the various alternatives and to discuss and consider fairly their adverse environmental impact.¹⁴⁰ The goal is more one of fairness and impartiality in presenting a thorough range of alternatives which the agency knows, has considered, or has had presented to it. An approach towards drafting the alternative section that always seeks the middle ground may become so automatic and mechanical as to be merely an effort

to comply with the formula, rather than a good faith effort at thoroughness and completeness.

Another problem in developing alternatives to be examined in an EIS may be stated in a variety of ways. The Forest Service has adopted a practice of stating the alternatives as issues which have been raised by the public or other groups with respect to the proposed action.¹⁴¹ Typically those issues are frequently stated as questions. This approach has the special advantage of directly confronting problems raised by others and resolving them. And under the CEQ final regulations the responsible agency must determine during the scoping process the significant issues for in-depth treatment in the EIS.

Many courts, when studying an EIS to determine whether it satisfies NEPA requirements, look mainly at its contents and substance rather than merely its form. One problem with issue-oriented alternatives, however, is that they may limit unduly the consideration of alternatives required under NEPA. The courts consistently have held that an EIS must contain a discussion of all reasonable alternatives, and "the existence of an unexamined, but viable alternative could render the [EIS] inadequate."¹⁴² Thus, if the discussion of alternatives as issues presented precludes examination of others that were available but not directly raised, the EIS might not be upheld.

The form the statement of issues takes may present another problem. If the issues are stated as questions, the problem arises whether that approach becomes result-oriented. Alternatives may seem result-oriented if they are stated as questions which have already been answered. In that instance the EIS may be too conclusionary, and any decision concerning alternatives would be a fait accompli. This approach would be incompatible with the impartiality requirement of NEPA and the use of the EIS as an ongoing process leading to an appropriate decision.¹⁴³

Also, alternatives should be stated clearly and concisely. The CEQ final regulations emphasize the importance of the EIS to the decisionmaker and citizens before action is taken. In order to make the EIS useful to public officials and citizens, the regulations recognize an EIS must be "written in plain language."¹⁴⁴ An agency should avoid presenting alternatives in any form that confuses or obscures significant issues.¹⁴⁵

Another problem in developing the issues and alternatives in an EIS is limiting them to ones raised by participants in the EIS process. If the issues selected for an in-depth analysis are only those raised by the public or interest groups as the only relevant ones, the EIS may be inadequate.¹⁴⁶ NEPA requires that the agency itself present a thorough and adequate discussion of the alternatives to the proposed project in the EIS. Every agency, in fact, must have public

participation as early as possible in the EIS process. But the agency may not merely limit its examination to matters raised by proponents or opponents of the project. Rather it is for the agency itself to put together examination and discussion of all available material including alternatives to bring the environmental data and impacts to the attention of the decisionmaker. Stated otherwise, even if there were no opponents or proponents presenting positions on the action that required an EIS, the agency would have to prepare an adequate EIS before undertaking the proposed action.¹⁴⁷

This view is also supported by the CEQ final regulations concerning public participation in the EIS process. The policy of those regulations is to encourage public participation in the entire NEPA process as early as possible.¹⁴⁸ Moreover, the public input and comments must be evaluated and considered in the decision. The CEQ final regulations also require public involvement in the environmental assessment stage that occurs prior to preparation of the EIS. That phase is designated to facilitate preparation of the EIS, and alternatives are considered at this stage when public participation is mandated.¹⁴⁹ Hence it is clear that an agency is not only permitted to use the public comments for developing alternatives but that it must do so. Nonetheless, public involvement alone will not relieve the agency of its duty to provide an otherwise thorough treatment of alternatives in the EIS.

The courts have consistently applied the rule of reason to determine what alternatives must be included in an EIS.¹⁵⁰ An EIS has been declared inadequate for failure to discuss all reasonable alternatives, including options that are outside the immediate jurisdiction and control of the agency.¹⁵¹ The EIS is inadequate if it fails to discuss the environmental effects of the alternatives considered,¹⁵² or if the discussion of alternatives lacks detail and careful analysis of the alternatives considered.¹⁵³ The EIS has been declared inadequate when it contained only a perfunctory and conclusionary statement that there was no alternative.¹⁵⁴ A review or listing of alternatives without detailed discussion or analysis of them is likewise inadequate.¹⁵⁵ An EIS has been declared inadequate for failing to consider national and international implications of the project¹⁵⁶ and for not resolving objections and conflicting points concerning alternatives to the project.¹⁵⁷

Guidelines to determine what are reasonable alternatives have been developed by courts. An EIS does not have to consider remote, speculative, or hypothetical alternatives nor those whose environmental effects are not known or ascertainable.¹⁵⁸ Available, viable alternatives, including not doing the proposed project, must be examined.¹⁵⁹ Stated otherwise, an EIS must discuss "realistic alternatives that will be reasonably available within the time frame the decision-making official intends to act."¹⁶⁰ The range of

alternatives included does not have to extend beyond those reasonably related to the proposed action.¹⁶¹ And if an alternative lessens environmental harm, it must be included even though it is not a complete solution to the problem.¹⁶² Also alternatives cannot be excluded simply because they are contrary to the official position of the preparing agency.¹⁶³ In short, the discussion of alternatives in the EIS should provide sufficient information to enable a fully informed, reasoned choice among them based on their environmental aspects. That discussion should also show that the decisionmaker considered other ways to achieve the desired goals, and it should allow those outside the decisionmaking process to evaluate and balance the factors for themselves.¹⁶⁴

The final EIS must show the basis on which the alternative selected was chosen. This is particularly true if, within the EIS itself, specific issues are raised, but unanswered. Similarly, the EIS should indicate the extent to which the environmental effects of discussed alternatives are unknown or uncertain.¹⁶⁵

The CEQ final regulations have placed an additional responsibility on agencies concerning alternatives.¹⁶⁶ Unless expressly prohibited by law, the draft and final EIS must identify the agency's environmentally preferred alternative to alternatives. The discussion of alternatives must be thorough enough to allow a comparative evaluation of them. It also must include appropriate mitigation measures not included in the proposed action or alternatives. It also must discuss briefly why alternatives were eliminated. In this manner the agency's choice can be appraised and compared fairly by public officials and citizens.

2. Cost-Benefit Analysis

The issue of whether a cost-benefit analysis must be prepared for every impact statement is highly controversial and remains unresolved. The issue stems from section 102(2)(B) of NEPA which requires that unquantified environmental amenities should be evaluated in a manner that they receive consideration along with other factors relevant to proceeding with a proposed project. That section also requires agencies to balance and consider environmental factors along with economic and technological ones in the decision-making process. The argument that a cost-benefit analysis must be prepared is based on a construction of these provisions together. This construction rests in part on the conclusion that the cost-benefit ratio is the only objective means to determine that the various factors were fairly considered and treated in the decision-making process.

However, nothing in NEPA itself expressly requires cost-benefit ratio or analysis. Clearly in some instances it will be present, such as on

water resource projects where the cost-benefit ratio must be prepared pursuant to Senate Document 97. But to require cost-benefit analysis on every project may be placing too heavy a burden on an agency.

The courts have held that NEPA generally requires some balancing of costs and benefits which in turn requires consideration of environmental factors in the process.¹⁶⁷ At the same time, however, the courts have not interpreted NEPA to require a precise mathematical balancing of costs and benefits that might otherwise be required in a formal cost-benefit analysis. Some courts have suggested that only through a cost-benefit type of analysis can they ascertain that the environmental factors have been adequately considered as required by NEPA.¹⁶⁸ As stated by one court, "The primary purpose of the impact statement is to compel federal agencies to give serious weight to environmental factors in making discretionary choices." . . . NEPA in effect, requires a broadly defined cost-benefit analysis of major federal activities."¹⁶⁹ Other courts have suggested that the cost-benefit analysis demonstrates that unquantified amenities have been considered in the decisionmaking process. That, however, does not require a specific dollar figure to be applied to either environmental costs or benefits.¹⁷⁰

Most courts have concluded that NEPA does not require a cost-benefit analysis. Typically the courts emphasize that the basis for making a decision to proceed does not turn upon strictly mathematical figures and precise quantification. The ultimate question, though, is whether the EIS fulfills the basic purposes and objectives of NEPA. "Specific assignment of dollar value to environmental factors, which are frequently not amenable to quantification, may not be necessary if the impact statement otherwise recognizes, discusses, and weighs the favorable and adverse effects of agency action. . . ."¹⁷²

Thus the EIS must show a balancing of costs and benefits even though no formal cost-benefit analysis is included in the impact statement. When a cost-benefit analysis has been prepared on a project, courts have found it useful in determining whether the agency has conducted the balancing process and given due consideration to environmental factors required by NEPA.¹⁷³

The CEQ guidelines for implementing NEPA never required a cost-benefit analysis. Neither do the CEQ final regulations.¹⁷⁵ The language used in the final regulations in fact suggests that it is optional. According to the final regulations, "If a cost-benefit analysis relevant to the choice among environmentally different alternatives is being considered for the proposed action, it shall be incorporated by references or appended to the statement as an aid in evaluating the environmental consequences."¹⁷⁶ Further, "When a cost-benefit analysis is prepared," the EIS must discuss the relationship between it and "any analyses of unquantified en-

vironmental impacts, values and amenities."¹⁷⁷ Specifically, the final regulations state that alternatives do not have to be shown in a "monetary cost-benefit analysis" in balancing their respective merits and drawbacks, and should not be so displayed . . . when there are important qualitative considerations."¹⁷⁸

3. Matrix Analysis

Another approach to quantifying environmental factors in the NEPA decisionmaking process is to use a matrix analysis in an EIS. The matrix system of environmental analysis attempts to quantify the values in an EIS for objective evaluation and consideration by the decision-maker.¹⁷⁹ The matrix system usually lists the characteristic activities involved in a proposed action on one axis of a chart. The resources and environmental qualities that may be affected are listed on the other axis. A number is then assigned to each space to represent the impact of each activity upon the listed environmental quality or resource. The total expected impact of one activity on all the resources and qualities can be determined by studying the whole column for that activity. By juxtaposing the activities on the one hand and the resources and environmental quality on the other, the total impact along the line for each resource can be compared to the rows for other resources next to it.¹⁸⁰

The matrix system of environmental analysis has several advantages when used in an EIS. At a time when the EIS process is being criticized for generating an overly technical, cumbersome, and unclear product that is unusable by the public and decisionmaker, the matrix can show much environmental information in an easily understood form. In this manner identification and comparison of an environmental impact can be simplified.

The matrix can also provide a useful reference check list showing the full range of actions and impacts. It illustrates quickly what the drafter of the EIS considered the most significant impacts and the importance of those impacts. The possible problem areas with respect to the proposed projects are thus more easily identified. Basically the matrix system allows large quantities of complex information to be displayed in a concise format.

The matrix system of environmental analysis, however, is not without its problems. A major criticism of it is its failure to explain the impact of an activity on the environment. The matrix shows a conclusion that the impact will result, but does not inform the user of any other details concerning the impact or the activity.¹⁸¹ Moreover, the matrix does not indicate how the conclusions that an impact would result were made. Often unanswered questions include whether the effect will be long-term or

short-term, seasonal or year-round, or a direct or indirect result of the activity. In addition, whether the impact, such as an increase in noise level, will occur uniformly in the area is not indicated. Similarly, whether and to what extent the activity will interfere with other uses such as recreation is not indicated. Often, therefore, a matrix system of analysis must be accompanied by extensive explanatory material, especially in instances where the activity is highly controversial. Then the matrix analysis is subject to the same complaints which plague EISs generally, namely that they are too technical and too bulky.

The matrix system of analysis also is subject to the complaint that it is vague and conclusionary.¹⁸² The matrix itself is not self-explanatory. It requires the decisionmaker or person using it to draw on the data presented for the results reached.

The matrix approach has been criticized as inadequately defining the impact of an activity on the environment. The impact typically is expressed in terms of relative significance. The number assigned to show the impact of one activity on environmental quality is selected in light of its relative significance with respect to other impacts on the same environmental quality. This type of quantification shows a comparative significance of the numbers, but may not give an accurate quantification of the impacts for objective evaluation of important qualitative considerations by the decisionmaker.

Another major objection to the matrix system is its inherently subjective nature. The numerical values used and relied on in reaching decisions about the proposed activity are those assigned by the drafter of the EIS. Using these values could result in a highly subjective, rather than objective, evaluation of the environmental effects of the project. In addition the matrix does not portray a dynamic man-environment relationship. It instead portrays a static relationship by implying a one-directional sequence of cause and effect, in which each action is directly responsible for environmental impact.

The judicial response to the matrix system of analysis has been fairly favorable. In two instances it specifically has been upheld.¹⁸⁴ The courts generally look to the matrix analysis to determine whether it satisfies the underlying requirement and objectives of NEPA. The matrix analysis is satisfactory if it conveys environmental information in a form that allows the decisionmaker to use it in the decisionmaking process. The inclusions and values assigned in the matrix analysis must be the result of good faith study and not be arbitrary and capricious. And finally the matrix analysis must not be used to mislead anyone.¹⁸⁵

Obviously, the validity of the matrix analysis would have to be decided on an ad hoc case-by-case basis. The approach will be sustained if

the EIS, in addition to containing the matrix, also has sufficient information to show the data from which the conclusions and values were obtained and have statements of reasons and resolutions of issues presented in the EIS. And any conclusions or statements in a matrix that are confusing, misleading, or controversial should be supported by supplemental information providing detailed information of both the problem and the approach used to resolve it. In the final analysis, the substance of the EIS ultimately is more important than its form.

4. Public Participation

Both NEPA and RPA/NFMA have provisions regarding public participation. The RPA/NFMA provisions, however, are more direct than the NEPA provisions. Specifically, the RPA/NFMA requires public participation in the development of the renewable resource assessment. Later, in section 1612, the Forest Service is directed to establish procedures for public hearings for the local government and the public, including notice and an opportunity to comment on all aspects of the Forest Service work. Similar provisions are included for the revision and modification of land management plans. A requirement for those plans is that it be amended only after public notice and after public involvement in the amendment process.

NEPA on the other hand only refers to the public at one point, the impact statement provision of section 102(2)(C). The EIS is required to be circulated to the President, CEQ, and the public. Because the requirements of RPA/NFMA are more extensive, compliance with those requirements would in all probability meet the minimum requirements of NEPA.

Problems arise, though, concerning what constitutes public participation. RPA/NFMA uses words such as "public involvement," "public participation," and "public hearings." The question arises under both Acts whether these phrases require adversary proceedings in which testimony is received and questions are asked of the participants, or whether they mean merely data-gathering hearings in which statements are received and papers are presented in evidence. In some instances under NEPA, even when the EIS has not been required, hearings have been required preceding a negative determination by the agency.¹⁸⁶ The extent and scope of those hearings is still being formulated by the courts.

Another issue is what type of notice is required and who should review it. This relates principally to the basic question of what constitutes the public. It seems clear in RPA/NFMA that the Forest Service must actively encourage and solicit participation by the public. But whether those requirements are satisfied by publishing notice of proposed action and holding hearings in selected locations is unanswered.

One problem is that by soliciting particular responses only those with a special interest or representing special interest groups are heard. Another problem is that the actual participation may be limited to the local persons directly affected by the activity. The concern is that any activity arguably affects a larger audience, a national or at least a regional one. Solicited comments may evoke responses only from those who are politically active or civic-minded. The fact that responses have been solicited and received, standing alone, does not indicate that the public actually is involved in the planning process. "Participation" or "involvement" may require something more than involvement in the balancing of interests or evaluation of factors leading up to trade-offs in the decisionmaking process itself.

Other questions also illustrate the uncertainty in the statutory phrases. An important one is how a national audience is reached. For some issues such as wilderness or clearcutting it seems clear that such an audience exists. Publication principally in the local area may not be sufficient to reach it. How notice should be given and where to hold these hearings are questions not easily answered. Locating the hearing in the affected area may not in fact reach concerned individuals who may live elsewhere, for example, in metropolitan areas.

Indirect participation on a national level occurs by the involvement of Congress. It is relevant and should be remembered that under RPA/NFMA annual reports on the Program and the management plans are reported directly to Congress. This is at least informal participation by Congress and, arguably, involves the public to the extent that Congress represents the public.

A major problem for an agency concerning public participation is what happens to the public comments and responses after they are received. It would be a stale affair if the material is merely gathered, collected, and placed in a file without ever being considered and evaluated. Moreover it would be a sterile affair if the public input is treated as cumulative and not addressed directly by the decisionmaker.

Focus on the agency's response to public input emphasizes another facet of the public involvement and participation issues: involvement suggests that whatever input is received from the public will be considered and discussed adequately in the decisionmaking process itself. This might include, for example, where practicable, taking particular responses and comments from identifiable groups and individuals and informing them of what ultimately happens to their responses and comments in the final decision. Or it may include having special hearings to obtain these initial comments and reactions from known and affected and concerned persons or groups and then having a discussion of them by the agency staff before a decision is made. Following the staff discussion another hearing may be useful to discuss proposed responses and solicit further

comment from the concerned individuals. This approach to public participation emphasizes active involvement in the decisionmaking process which arguably is what Congress intended in both RPA/NFMA and NEPA. An approach that provides an opportunity for maximum public input, regardless of statutory mandates, also may benefit an agency indirectly by producing decisions which are more likely to be acceptable to the public and procedurally defensible in the courts.

The CEQ final regulations recognize the value of public input into the agency's decisionmaking by providing for greater participation by the public in the NEPA process. The regulations require that the public be brought into an agency's scoping process for proposed actions.¹⁸⁷ By being involved in scoping, the public will be involved early in the determination of the issues that will be discussed in the EIS and also will have input into its preparation.

The regulations further require that the public have notice and the opportunity to be heard concerning a draft EIS.¹⁸⁸ Specifically, the regulations state that an agency must invite comment on a draft EIS from the public-at-large, including concerned individuals and groups.¹⁸⁹ More important, however, is the requirement that the final EIS must contain the agency's responses to all comments received about the proposed action, the EIS, and related matters.¹⁹⁰ One or more of the following responses must be included: changing alternatives; adding alternatives; correcting facts; supplementing, improving, or modifying analysis in the EIS; or explaining "why the comments do not warrant further agency response, citing the sources, authorities, or reasons which support the agency's position and if appropriate, indicate those circumstances which would trigger reappraisal or further response."¹⁹¹ The agency's responses in the final EIS may handle comments individually or collectively. Through these mandates the CEQ final regulations require that an agency implement public participation in the broader sense of active involvement.¹⁹²

5. The CEQ Final Regulations on Implementing NEPA

The CEQ final regulations change the NEPA process in significant respects from that which was conducted under the CEQ final guidelines. The final regulations became effective July 30, 1979. A major change is that the regulations deal not only with the EIS process but also all the other procedural and substantive requirements of NEPA.¹⁹³

The purpose of the regulations is to reduce paperwork, to reduce delays, and to achieve environmentally better decisions. The regulations require agencies to adopt implementing regulations to carry out the procedures of section 102 in a manner that will attain the environmental objectives stated in section 101. The

regulations require greater attention and consideration to environmentally less harmful options and mitigation efforts in the choice of alternatives.¹⁹⁴ Time delays are avoided by setting timeframes for the NEPA process, using the scoping process, and by providing a procedure to select a lead agency more quickly.

Paperwork is reduced in several ways. A page limit of 150 pages or less is set for a typical EIS, and of 300 pages for a more complicated one. EISs are to be written in plain, concise English and be "analytical rather than encyclopedic."¹⁹⁵ Supporting documents including other EISs are to be incorporated by reference and summarized, rather than included verbatim, in the text of the EIS.¹⁹⁶ Agencies are urged to use EISs and other environmental documents prepared by other agencies. The EIS also is to focus on the physical environment and harm to it. The analyses included are to relate principally to environmental problems and to minimize background material.¹⁹⁷ The objective is to provide a product that can be read and understood by the public and the decisionmaker.

Better decisions are sought through carrying out the substantive mandates of NEPA. The regulations require agencies to use the section 102 procedures to fulfill the policy objectives and requirements of section 101. Specifically, the regulations require agencies to determine environmentally preferred alternatives, to justify choices other than environmentally preferred alternatives, to consider mitigation measures even if they are not included in stated alternatives, and to use mitigation measures in carrying out all projects.¹⁹⁸

Moreover, in situations where more than one agency is preparing an EIS, a procedure is provided to have disagreements handled by the CEQ if an agency disagrees for environmental reasons with a decision to proceed.¹⁹⁹ After opportunities for all concerned agencies and the public to respond, the CEQ has several options, including making recommendations and referring the matter to the President for final decision.²⁰⁰ The predecision referral of actions determined to be environmentally unsatisfactory is included as a separate section in the regulations.²⁰¹ In addition, decisionmaking is affected by the regulations requiring an agency to involve the NEPA process as early as possible in its decisionmaking process. This, of course, emphasizes the planning aspects of NEPA as a means to avoid environmental degradation.

The CEQ also has several requirements to the NEPA process not included previously in the CEQ final guidelines. A status quo rule has been adopted by which an agency is prohibited from taking any action on a proposed project which would have an adverse environmental impact or limit the choice of reasonable alternatives. Similarly, the agency must stop private applicants from undertaking action which would adversely affect the environment or the choice of alternatives

before the agency approves the application.²⁰² The regulations require cooperation with state agencies having statewide jurisdiction to the maximum extent allowed under section 102(2)(D). This cooperation may minimize duplicative work by federal agencies meeting NEPA requirements and state and local agencies meeting similar state requirements. A federal agency must cooperate with appropriate state agencies unless it is prohibited by statute from doing so.²⁰³

To coordinate planning within an agency, the CEQ regulations authorize agencies to use other agencies' EISs if, after in-depth review, the agency concludes it is an adequate statement.²⁰⁴ Cooperating agencies are allowed to adopt the lead agency's EIS after an independent review of that statement. The cooperating agency must determine that the lead agency adequately treated its comments and suggestions. Furthermore, the regulations authorize agencies to combine their NEPA documents with any other work of the agency to minimize paperwork and to avoid duplication of effort.²⁰⁵ This internal coordination may be important for the Forest Service, for example, in combining multiple use management with the EIS process. Likewise, other statutory requirements can be considered in the EIS, for example, in the discussion of alternatives or adverse environmental impacts where historic preservation or endangered species impacts may be identified and discussed. The alternatives may consider how those impacts can be avoided and the area protected and preserved. In this manner the objectives and requirements of historic preservation and endangered species conservation may be simultaneously satisfied in the EIS.

The CEQ regulations are also a directive for agency decisionmaking under NEPA.²⁰⁶ Specifically, an agency must adopt procedures that will implement the procedures under section 102(2) to meet the requirements of sections 101 and 102(1). Further, the agency must designate major decision points within its principal programs that would have a significant effect on the human environment and assure that those programs comply with the NEPA process.²⁰⁷ The agency must assure that relevant environmental documents, comments, and responses are part of the record in formal rulemaking or adjudicatory proceedings.²⁰⁸ Those same materials must also accompany any proposal throughout the existing agency review procedures so that the materials will be used by the persons making the decisions. The agency must assure that alternatives considered by the decisionmaker are within the range of alternatives covered in the relevant environmental documents and, specifically, those covered in the environmental impact statement. Lastly, the regulations require an agency to prepare a "concise public record of decision" at the time of its decision or its recommendations to Congress.²⁰⁹

Thus, the CEQ regulations have continued the expansive interpretation and treatment that

NEPA has received previously both judicially and administratively. The regulations focus in large part on the ultimate decisions made by the agency. This focus on decisionmaking reflects concern that NEPA is more than merely a procedural statute, that it has substantive requirements and that the substantive mandate has not been implemented in agency decisions to date. Two recent cases support the conclusion that NEPA is also a substantive statute. In Public Service Co. of New Hampshire v. Nuclear Regulatory Commission²¹⁰ the court considered whether the Atomic Energy Act and NEPA provided authority for the NRC to control and determine the location or relocation of transmission lines. Specifically, the court concluded that the NRC had jurisdiction over the transmission lines, and stated, "it is clear that under the dictates of NEPA it [the NRC] was obligated to minimize adverse environmental impact flowing therefrom."²¹¹

The second case was Karlen v. Harris²¹² in which the Second Circuit also upheld substantive review under NEPA. In Karlen the United States Department of Housing and Urban Development (HUD) had approved a low income housing project which would have resulted in a greater concentration of low income minority residents. The court examined the proposal and the discussion of alternatives. It concluded that an alternative which would result in less concentration of economic and racial groups had to be examined under the mandate of the HUD program and NEPA. In determining the scope of review, the court stated, "[T]he provisions of NEPA contained the substantive standards necessary to review the merits of agency decisions under the APA."²¹³ In concluding that HUD had not adequately considered environmental factors in rejecting alternatives solely because of the delay in building the housing, the court stated, "It is quite evident that delay (outranking all other environmental considerations) was a paramount factor in HUD's decision" and "we hold that delay is not to be regarded as an overriding factor and that environmental factors, such as crowding low-income housing into a concentrated area, should be given determinative weight."²¹⁴

On appeal to the United States Supreme Court, however, the Karlen case was reversed.²¹⁵ The Court held that HUD had done all that was required under NEPA. It had taken a "hard look" at environmental factors. The Court reversed because it believed the Second Circuit was imposing procedures on the agency not required by any law.²¹⁶

Those decisions reinforce the CEQ's interpretation of NEPA as imposing substantive as well as procedural requirements on federal agencies in their decisionmaking process. Of course, the CEQ final regulations are designed to aid agencies in adopting regulations implementing the NEPA process in a manner that satisfies both the substantive and procedural requirements of NEPA.²¹⁷ Whether an agency is successful in doing that turns not only on its adoption of adequate implementing regulations but also on its actually

carrying out those regulations in its planning and decisionmaking process.

D. GENERAL EFFECT ON AGENCY DECISIONMAKING PROCESS

The overall policy and objectives of NEPA to protect and minimize harm to the natural environment for present and future generations of Americans cannot be overstated. NEPA provides a fertile ground for litigation to seek review of agency action which may adversely affect the environment. This litigation will continue and be expanded to seek review of the merits of an agency's decision to proceed with a proposed action.

Through adoption of procedures to implement NEPA's mandate agencies can reduce the risk of litigation, at least on procedural grounds, if the procedures the agency established are followed. Those procedures should anticipate areas that have been troublesome to courts. NEPA is unclear concerning notice and opportunity for hearings, the agency's record, and the standard of review concerning an agency's compliance with the statutory mandates. An agency can protect against deficiencies in these areas by requiring notice, hearings, and recordkeeping, when practicable, as early as possible in the planning process. This approach not only lessens the chance of litigation but arguably attempts to fulfill both the letter and the spirit of NEPA. Specifically, an agency's procedures should maximize public participation by early notice and involvement of known or easily identifiable interested groups. The hearings and meetings can be done according to a time schedule set in the scoping process.

The agency's procedures should also require an accurate record be made of any hearings, meetings, and facts considered in the decisionmaking. This record should be more than a mere compilation of documents; it should show what matters were considered and how they satisfy the NEPA mandates. The recordkeeping applies not only to the scoping processes, but also to negative determinations, as well as the whole NEPA process. The requirement is not necessarily a voluminous document nor merely documentation, but rather a written record that is adapted to the nature of a particular decision. For example, on a negative determination courts have required that the record be adequate to show that the specific EIS requirements were examined and determined to be inapplicable. The reasons for the negative determination must be briefly stated. The justification of the court is that an agency must present a record which is adequate to ascertain that the agency understood its NEPA obligations and was reasonable in carrying them out. Some record is required even though NEPA does not expressly require it. Without one, judicial review of the agency's action would be impossible.

This minimum record, in turn, enables the court to apply a minimum standard of judicial review--whether the agency's decision was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."²¹⁸ An adequate record assists the court by showing what evidence and facts the agency looked at, what legal provisions were applicable, and the reasons for the decision.

A record serves a function other than its role in the judicial review process. It establishes an internal review method for the agency's decisionmaking process. Recordkeeping in that sense helps the decisionmaker assure that the adequate and appropriate facts, evidence, and law were considered and properly applied in reaching a result. It also shows the justification for the decision. An adequate record can bring each of these points clearly to the attention of the ultimate decisionmaker for appropriate consideration. In that sense, a positive aspect of judicially required records in NEPA cases is improving the agency decisionmaking process. Specifically, courts are helping agencies by simply having them state the basis and reasons behind their decisions.²¹⁹ Often the decisions are delayed not because they are wrong, but because without clearly stated reasons, they may be based on improper factors and hence arbitrary and capricious. Agencies should not be afraid to state the reasons for their decision.

Agencies have discretion to adopt whatever procedures they desire so long as those used are consistent with the CEQ final regulations. Procedures which have the decisionmaker articulate clearly the factors considered, the applicable law, the evidence examined, and the reasons for the decisions will more completely fulfill the objective of the final regulations to have environmentally sound decisions.

NOTES

¹42 U.S.C. §§ 4321-61 (1976).

²E.g., *Environmental Defense Fund, Inc. v. Corps of Engineers*, 325 F. Supp. 741 (E.D. Ark. 1971) (Gillham Dam).

³Section 202 of NEPA established the Council on Environmental Quality as an executive agency to prepare studies, to review programs and activities of the government, to formulate policies, and to advise the President on environmental matters. 42 U.S.C. §§ 4342, 4344 (1976).

⁴The CEQ prepares the Environmental Quality Report each year for the President to transmit to Congress. *Id.* at § 4341.

⁵*Id.* at § 4332(2)(A).

⁶*Id.* at § 4332(2)(C).

⁷*Id.* at § 4331(a).

⁸*Id.* at § 4331(b).

⁹*Id.* at § 4331(c).

¹⁰*Id.* at § 4331.

¹¹*Id.* at § 4332(2)(C).

¹²*Id.* at § 4332(2)(B).

¹³Hearings on S. 1075 Before the Senate Committee on Interior and Insular Affairs, 91st Cong., 1st Sess. 116 (1969) (statement of Senator Jackson).

¹⁴*Id.* at § 4332(2)(A).

¹⁵NEPA authorizes and encourages federal agencies to consult and exchange information with other federal and state officials, private groups and individuals as well as with the CEQ. *Id.* at § 4332.

¹⁶*Greene County Planning Board v. Federal Power Commission*, 455 F.2d 412 (2d Cir. 1972), cert. denied, 409 U.S. 849 (1972). The authority to delegate preparation of the environmental impact statement to others is very limited. See 42 U.S.C. § 4332(2)(D) (1976) which permits preparation by state agency with statewide jurisdiction, if the federal agency, *inter alia*, assists and participates in the preparation and independently evaluates, approves, and adopts the statement as the agency's.

¹⁷42 U.S.C. § 4332(2)(B) (1976).

¹⁸*Id.* at § 4332(2)(C).

¹⁹*Id.* at §§ 4332(2)(C)(i)-(v).

²⁰*Id.* at § 4332(2)(C).

²¹*Id.*

²²*Id.*

²³CEQ Final NEPA Regulations, 43 Fed. Reg. 55,978 (1978) [hereinafter cited as CEQ Final NEPA Regulations].

²⁴*Id.* See text at 49-60 *infra*.

²⁵The landmark case reviewing an agency's procedures for implementing NEPA and interpreting it is *Calvert Cliffs' Coordinating Committee v. Atomic Energy Commission*, 449 F.2d 1109 (D.C. Cir. 1971).

²⁶42 U.S.C. § 4332(2)(C) (1976).

²⁷*Calvert Cliffs' Coordinating Committee v. Atomic Energy Commission*, 449 F.2d 1109 (D.C. Cir. 1971).

²⁸42 U.S.C. § 4332(2)(E) (1976).

²⁹*Id.* at § 4332(2)(F). See Exec. Order No. 12,114, *Environmental Effects Abroad of Major Federal Action* (Jan. 4, 1979).

³⁰42 U.S.C. § 4332(2)(G) (1976).

³¹*Id.* at § 4332(2)(H).

³²*Id.* at § 4332(2)(I).

³³Exec. Order No. 11,991, 42 Fed. Reg. 26,967 (1977).

³⁴CEQ Final NEPA Regulations, § 1500.6, note 23 *supra*.

³⁵Two cases concluded that the time allowed for the action required under other statutes was insufficient to prepare an EIS under NEPA section 102. *Flint Ridge Development Co. v. Scenic Rivers Association of Oklahoma*, 426 U.S. 776

(1976) (30 days for HUD to complete review of developer's disclosure statement); *Alaska v. Carter*, ___ F. Supp. ___, 12 ERC 1486 (D. Alaska 1978) (emergency land withdrawal under FLPMA).

³⁶See, e.g., *Calvert Cliffs' Coordinating Committee v. Atomic Energy Commission*, 449 F.2d 1109 (D.C. Cir. 1977).

³⁷42 U.S.C. § 4332(2)(C) (1976).

³⁸*Kelley v. Butz*, 404 F. Supp. 925 (D. Mich. 1975).

³⁹*Hanly v. Kleindienst*, 471 F.2d 823 (2d Cir. 1972), cert. denied, 412 U.S. 908 (1973).

⁴⁰The CEQ Final NEPA Regulations, §§ 1501.3 and 1508.9, require an "environmental assessment" be prepared to support a negative determination and provide reasons for the agency's decision. Notice, hearings, availability to public, and review are suggested procedures for an agency to include in preparing the assessment and making a negative determination. Id.

⁴¹See, CEQ Final NEPA Regulations, § 1508.18, which combines the two concepts: "Major reinforces but does not have a meaning independent of significantly." Id.

⁴²E.g., *Natural Resources Defense Council, Inc. v. Grant*, 341 F. Supp. 356 (D.N.C. 1972).

⁴³*Kleppe v. Sierra Club*, 427 U.S. 390 (1976).

⁴⁴5 U.S.C. §§ 701-06 (1976).

⁴⁵Id. at § 706(2)(A).

⁴⁶E.g., *Wyoming Outdoor Coordinating Committee v. Butz*, 484 F.2d 1244 (10th Cir. 1973); *Minnesota Public Interest Research Group v. Butz*, 498 F.2d 1314 (8th Cir. 1974).

⁴⁷E.g., *Minnesota Public Interest Research Group v. Butz*, 541 F.2d 1292 (8th Cir. 1976) (upholding EIS).

⁴⁸See *Hanly v. Kleindienst*, 471 F.2d 823 (2d Cir. 1972), cert. denied, 412 U.S. 908 (1973).

⁴⁹Id.

⁵⁰CEQ, Final Guidelines on the Preparation of Environmental Impact Statements, § 1500.5, 38 Fed. Reg. 20,550 (1973).

⁵¹CEQ Final NEPA Regulations, § 1508.27(4), note 23 supra.

⁵²484 F.2d 1244 (10th Cir. 1973).

⁵³Id. at 1249.

⁵⁴404 F. Supp. 925 (W.D. Mich. 1975).

⁵⁵389 F. Supp. 1065 (E.D. Wisc. 1975).

⁵⁶579 F.2d 59 (10th Cir. 1978).

⁵⁷Id. at 66.

⁵⁸*Wyoming Outdoor Coordinating Council v. Butz*, 484 F.2d 1244 (10th Cir. 1973).

⁵⁹406 F. Supp. 742 (D. Mont. 1975).

⁶⁰*Friends of the Earth, Inc. v. Butz*, 406 F. Supp. 742 (D. Mont. 1975), remanded as moot sub nom., *Friends of the Earth, Inc. v. Bergland*, 576 F.2d 1378 (9th Cir. 1978).

⁶¹*Friends of the Earth, Inc. v. Butz*, 406 F. Supp. at 747. See also CEQ Final NEPA

Regulations, § 1508.4 (categorized exclusions).

⁶²42 U.S.C. § 4332(2)(C) (1976).

⁶³*Minnesota Public Research Group v. Butz*, 498 F.2d 1314 (8th Cir. 1974); *Save Our Ten Acres v. Kreger*, 472 F.2d 463 (5th Cir. 1973).

⁶⁴See generally W. RODGERS, *ENVIRONMENTAL LAW* 755 (West 1977).

⁶⁵*Hanly v. Mitchell*, 460 F.2d 640, 647 (2d Cir. 1972).

⁶⁶*City of Davis v. Coleman*, 521 F.2d 661 (9th Cir. 1975).

⁶⁷F. ANDERSON, *NEPA IN THE COURTS* (Johns Hopkins University Press 1973).

⁶⁸E.g., *City of Davis v. Coleman*, 521 F.2d 661 (9th Cir. 1975).

⁶⁹*First Nat'l Bank of Chicago v. Richardson*, 484 F.2d 1369 (7th Cir. 1973).

⁷⁰*Kelley v. Butz*, 404 F. Supp. 925 (W.D. Mich. 1975).

⁷¹Cf. *Wyoming Coordinating Council v. Butz*, 484 F.2d 1244 (10th Cir. 1973).

⁷²*Kelley v. Butz*, 404 F. Supp. 925 (W.D. Mich. 1975).

⁷³CEQ Final NEPA Regulations, § 1504.4, note 23 supra.

⁷⁴Id. at § 1508.9.

⁷⁵Id. at § 1508.27.

⁷⁶E.g., *Natural Resources Defense Council, Inc. v. Morton*, 388 F. Supp. 829 (D.D.C. 1974), aff'd, 527 F.2d 1386 (D.C. Cir.), cert. denied, 427 U.S. 913 (1976).

⁷⁷E.g., *Scientists' Institute for Public Information, Inc. v. Atomic Energy Commission*, 481 F.2d 1079 (D.C. Cir. 1973).

⁷⁸*Sierra Club v. Andrus*, 581 F.2d 895 (D.C. Cir. 1978).

⁷⁹Cf., *Sierra Club v. Stamm*, 507 F.2d 788 (10th Cir. 1974).

⁸⁰E.g., *Scientists' Institute for Public Information, Inc. v. Atomic Energy Commission*, 481 F.2d 1079 (D.C. Cir. 1973).

⁸¹See *City of Rochester v. U.S. Postal Service*, 541 F.2d 967 (2d Cir. 1976); *Atchison, Topeka and Santa Fe Railway Co. v. Callaway*, 382 F. Supp. 610 (D.D.C. 1974).

⁸²*Kleppe v. Sierra Club*, 427 U.S. 390 (1976).

⁸³See, e.g., *Natural Resources Defense Council, Inc. v. Energy Research and Development Administration*, ___ F. Supp. ___, 11 ERC 1607 (D.D.C. 1978); *Kelley v. Butz*, 404 F. Supp. 925 (W.D. Mich. 1975); *Natural Resources Defense Council, Inc. v. Morton*, 388 F. Supp. 829 (D.D.C. 1974), aff'd, 527 F. Supp. 1386 (D.C. Cir.), cert. denied, 427 U.S. 913 (1976).

⁸⁴*Scientists' Institute for Public Information, Inc. v. Atomic Energy Commission*, 481 F.2d 1079 (D.C. Cir. 1973).

⁸⁵Id.

⁸⁶Natural Resources Defense Council, Inc. v. Hodel, 435 F. Supp. 590 (D. Ore. 1977).

⁸⁷See Alpine Lakes Protection Society v. Schlaffer, 518 F.2d 1089 (9th Cir. 1975).

⁸⁸Dalsis v. Hills, 424 F. Supp. 784 (W.D.N.Y. 1976); Indian Lookout Alliance v. Volpe, 484 F.2d 11 (8th Cir. 1973).

⁸⁹Kleppe v. Sierra Club, 427 U.S. 390 (1976).

⁹⁰E.g., Scientists' Institute for Public Information, Inc. v. Atomic Energy Commission, 481 F.2d 1079 (D.C. Cir. 1973).

⁹¹Kleppe v. Sierra Club, 427 U.S. 390 (1976).

⁹²Id.

⁹³Id.

⁹⁴E.g., Scientists' Institute for Public Information, Inc. v. Atomic Energy Commission, 481 F.2d 1079 (D.C. Cir. 1973).

⁹⁵Sierra Club v. Callaway, 490 F.2d 982 (5th Cir. 1974); Indian Lookout Alliance v. Volpe, 484 F.2d 11 (8th Cir. 1973).

⁹⁶Minnesota Public Interest Research Group v. Butz, 541 F.2d 1292 (8th Cir. 1976).

⁹⁷E.g., Indian Lookout Alliance v. Volpe, 484 F.2d 11 (8th Cir. 1973); Swain v. Brinegar, ___ F.2d ___, 9 ERC 1086 (7th Cir. 1976).

⁹⁸See Sierra Club v. Callaway, 490 F.2d 982 (5th Cir. 1974).

⁹⁹Scientists' Institute for Public Information, Inc. v. Atomic Energy Commission, 481 F.2d 1079 (D.C. Cir. 1973).

¹⁰⁰Id.

¹⁰¹Sierra Club v. Callaway, 490 F.2d 982 (5th Cir. 1974).

¹⁰²Kleppe v. Sierra Club, 427 U.S. 390 (1976).

¹⁰³Minnesota Public Interest Research Group v. Butz, 498 F.2d 1314 (8th Cir. 1974).

¹⁰⁴16 U.S.C. § 1604 (1976).

¹⁰⁵California v. Bergland, ___ F. Supp. ___, 13 ERC 2203 (E.D. Ca. 1980).

¹⁰⁶Id.

¹⁰⁷Id.

¹⁰⁸13 ERC at 2208-10.

¹⁰⁹Id. at 2209.

¹¹⁰Id. at 2204.

¹¹¹Id. at 2206 n.4.

¹¹²CEQ Final Regulations, § 1502.4, note 23 supra.

¹¹³42 U.S.C. § 4332(2)(D) was added by Pub. L. No. 94-83 (1975).

¹¹⁴Conservation Society of Southern Vermont, Inc. v. Secretary of Transportation, 508 F.2d 927 (2d Cir. 1974).

¹¹⁵Greene County Planning Board v. Federal Power Commission, 455 F.2d 412 (2d Cir.) cert. denied, 409 U.S. 849 (1972); Swain v. Brinegar, 517 F.2d 761 (7th Cir. 1975).

¹¹⁶Conservation Society of Southern Vermont, Inc. v. Secretary of Transportation, 531 F.2d 637 (2d Cir. 1976) (dissenting opinion).

¹¹⁷CEQ Final NEPA Regulations, § 1508.16, note 23 supra; e.g., Natural Resources Defense Council, Inc. v. Morton, 458 F.2d 829 (D.C. Cir. 1972).

¹¹⁸CEQ Final NEPA Regulations, § 1501.5, note 23 supra.

¹¹⁹Id. at § 1501.5(c).

¹²⁰Id. at § 1501.5(f).

¹²¹Id. at § 1501.7.

¹²²Id. at § 1501.7(a).

¹²³Id. at § 1502.21.

¹²⁴E.g., Calvert Cliffs' Coordinating Committee v. Atomic Energy Commission, 449 F.2d 1109 (D.C. Cir. 1972).

¹²⁵The standard for review is usually stated as "good faith objectivity" in the preparation and consideration of the EIS rather than subjective impartiality. Kasteu v. Coleman, 530 F.2d 176 (8th Cir. 1976); Minnesota Public Interest Research Group v. Butz, 541 F.2d 1292 (8th Cir.), cert. denied, 430 U.S. 922 (1975). A court must make sure the agency took a "hard look" at the environmental consequences of the proposed action. Kleppe v. Sierra Club, 427 U.S. 390, 410 n.21 (1976).

¹²⁶E.g., Environmental Defense Fund, Inc. v. Corps of Engineers, 470 F.2d 289 (8th Cir.), cert. denied, 412 U.S. 931 (1972). See also Life of the Land v. Brinegar, 485 F.2d 460 (9th Cir. 1973), cert. denied, 416 U.S. 961 (1973).

¹²⁷Environmental Defense Fund, Inc. v. Corps of Engineers, 470 F.2d 289 (8th Cir.), cert. denied, 412 U.S. 931 (1972).

¹²⁸CEQ Final NEPA Regulations, § 1502.14, note 23 supra.

¹²⁹E.g., Natural Resources Defense Council, Inc. v. Callaway, 524 F.2d 79 (2d Cir. 1975); Natural Resources Defense Council, Inc. v. Morton, 458 F.2d 827 (D.C. Cir. 1972).

¹³⁰42 U.S.C. § 4332(2)(E) (1976).

¹³¹Trinity Episcopal School Corp. v. Romney, 523 F.2d 88 (2d Cir. 1975) (no EIS required, but alternatives had to be considered); City of New Haven v. Chandler, 446 F. Supp. 925 (D. Conn. 1978).

¹³²E.g., Robinson v. Knebel, 550 F.2d 422 (8th Cir. 1977).

¹³³E.g., Natural Resources Defense Council, Inc. v. Morton, 458 F.2d 827 (D.C. Cir. 1972).

¹³⁴City of Romulus v. Wayne County, 392 F. Supp. 578 (D. Mich. 1975).

¹³⁵Scientists' Institute for Public Information, Inc. v. Atomic Energy Commission, 481 F.2d 1079 (D.C. Cir. 1973).

¹³⁶E.g., Fayetteville Chamber of Commerce v. Volpe, 515 F.2d 1021 (4th Cir. 1975).

¹³⁷E.g., *Sierra Club v. Lynn*, 502 F.2d 43 (5th Cir. 1974), cert. denied, 421 U.S. 994 (1975).

¹³⁸E.g., *Matsumoto v. Brinegar*, 568 F.2d 1289 (9th Cir. 1978); *Environmental Defense Fund v. Corps of Engineers*, 325 F. Supp. 749 (E.D. Ark. 1971). See also *California v. Bergland*, ___ F. Supp. ___, 13 ERC 2203 (E.D. La. 1980) where a no action alternative was not considered as the equivalent of a wilderness alternative for RARE II.

¹³⁹See note 125 supra and accompanying text.

¹⁴⁰*Environmental Defense Fund, Inc. v. Froehlke*, 473 F.2d 346 (8th Cir. 1972).

¹⁴¹Final Environmental Statement and Land Management Plan, South Fork Salmon River Planning Unit, Boise and Payette National Forests 69-70 (USDA Forest Service 1977). See also *California v. Bergland*, ___ F. Supp. ___, 13 ERC 2203 (E.D. Ca. 1980).

¹⁴²*Brooks v. Coleman*, 518 F.2d 17 (9th Cir. 1975).

¹⁴³*Sierra Club v. Froehlke*, 392 F. Supp. 130 (D. Mo. 1975), aff'd, 534 F.2d 1289 (8th Cir. 1976); *Stop H-3 Ass'n v. Volpe*, 353 F. Supp. 14 (D. Hawaii 1972).

¹⁴⁴CEQ Final NEPA Regulations § 1502.8, note 23 supra.

¹⁴⁵Cf., CEQ SIXTH ANNUAL ENVIRONMENTAL QUALITY REPORT 632-34 (1975).

¹⁴⁶See *Calvert Cliffs' Coordinating Committee v. Atomic Energy Commission*, 449 F.2d 1109 (D.C. Cir. 1971); *Greene County Planning Board v. Federal Power Commission*, 455 F.2d 412 (2d Cir.), cert. denied, 409 U.S. 849 (1972).

¹⁴⁷Id.

¹⁴⁸CEQ Final NEPA Regulations §§ 1500.2 and 1501.7, note 23 supra. See also *California v. Bergland*, ___ F. Supp. ___, 13 ERC 2203 (E.D. La. 1980).

¹⁴⁹CEQ Final NEPA Regulations § 1501.4, note 23 supra.

¹⁵⁰E.g., *Mason County Medical Ass'n v. Knebel*, 563 F.2d 256 (6th Cir. 1977).

¹⁵¹E.g., *Sierra Club v. Lynn*, 502 F.2d 43 (5th Cir. 1974); *Natural Resources Defense Council, Inc. v. Morton*, 458 F.2d 827 (D.C. Cir. 1977).

¹⁵²*Concerned About Trident v. Rumsfeld*, 555 F.2d 817 (D.C. Cir. 1977).

¹⁵³*Environmental Defense Fund, Inc. v. Froehlke*, 473 F.2d 346 (8th Cir. 1972); *Natural Resources Defense Council, Inc. v. Callaway*, 524 F.2d 79 (2d Cir. 1975).

¹⁵⁴Cf., *Trinity Episcopal School Corp. v. Romney*, 523 F.2d 88 (2d Cir. 1975).

¹⁵⁵E.g., *Swain v. Brinegar*, 517 F.2d 766 (7th Cir. 1975).

¹⁵⁶Id.

¹⁵⁷*Silva v. Lynn*, 482 F.2d 1282 (1st Cir. 1973).

¹⁵⁸E.g., *Scientists' Institute for Public Information, Inc. v. Atomic Energy Commission*, 481 F.2d 1079 (D.C. Cir. 1973); *Sierra Club v. Lynn*, 502 F.2d 43 (5th Cir. 1974).

¹⁵⁹*Brooks v. Coleman*, 518 F.2d 17 (9th Cir. 1975).

¹⁶⁰*Fayetteville Chamber of Commerce v. Volpe*, 515 F.2d 1021 (4th Cir. 1975).

¹⁶¹*Robinson v. Knebel*, 550 F.2d 422 (8th Cir. 1977).

¹⁶²*Natural Resources Defense Council, Inc. v. Morton*, 458 F.2d 827 (D.C. Cir. 1972).

¹⁶³Cf., id.

¹⁶⁴*Sierra Club v. Morton*, 510 F.2d 813 (5th Cir. 1975).

¹⁶⁵*Citizens Against Toxic Sprays, Inc. v. Bergland*, 428 F.Supp. 908 (D. Ore. 1977).

¹⁶⁶CEQ Final NEPA Regulations § 1502.14, note 23 supra.

¹⁶⁷E.g., *Texas Committee on Natural Resource v. Bergland*, 433 F. Supp. 1235 (E.D. Tex. 1977), rev'd on other grounds, 573 F.2d 201 (5th Cir. 1978).

¹⁶⁸See *State of Alabama ex rel. Baxley v. Corps of Engineers*, 411 F. Supp. 1261 (D. Ala. 1976).

¹⁶⁹*Chelsea Neighborhood Ass'n v. United States Postal Service*, 516 F.2d 378, 386 (2d Cir. 1975).

¹⁷⁰E.g., *Sierra Club v. Stamm*, 507 F.2d 788, 794 (10th Cir. 1974).

¹⁷¹E.g., *Trout Unlimited v. Morton*, 509 F.2d 1276 (9th Cir. 1974).

¹⁷²*Robinson v. Knebel*, 550 F.2d 422, 426 (8th Cir. 1977).

¹⁷³Cf., *Sierra Club v. Froehlke*, 359 F. Supp. 1289 (S.D. Tex. 1973), rev'd on other grounds sub nom. *Sierra Club v. Callaway*, 499 F.2d 982 (5th Cir. 1974).

¹⁷⁴CEQ Final Guidelines, "Preparation of Environmental Impact Statements," 38 Fed. Reg. 20550 (1973).

¹⁷⁵CEQ Final NEPA Regulations, note 23 supra.

¹⁷⁶Id. at § 1502.23.

¹⁷⁷Id.

¹⁷⁸Id.

¹⁷⁹See *Minnesota Public Interest Research Group v. Butz*, 541 F.2d 1292 (8th Cir. 1976) (approving Forest Service use of matrix in EIS). See also *California v. Bergland*, ___ F. Supp. ___, 13 ERC 2203 (E.D. Ca. 1980).

¹⁸⁰For an example of a matrix see the trial court's opinion disapproving the use of matrix analysis in *Minnesota Public Interest Research Group v. Butz*, 401 F. Supp. 1276, 1338 (D. Minn. 1975), rev'd, 541 F.2d 1292 (8th Cir. 1976).

¹⁸¹401 F. Supp. at 1276.
¹⁸²*Cf.*, California v. Bergland, ___ F. Supp. ___, 13 ERC 2203 (E.D. Ca. 1980) (RARE II EIS described as vague and conclusionary).

¹⁸³401 F. Supp. 1276 (D. Minn. 1975).

¹⁸⁴*See* Minnesota Public Interest Research Group v. Butz, 541 F.2d 1292 (8th Cir. 1976) (approving Forest Service use of matrix in EIS); Sierra Club v. Morton, 510 F.2d 813 (5th Cir. 1975).

¹⁸⁵*Id.*

¹⁸⁶*E.g.*, Hanly v. Kliendienst, 471 F.2d 823 (2d Cir. 1972). *See* text accompanying note 37 *supra*.

¹⁸⁷CEQ Final Regulations § 1501.7(a), note 23 *supra*.

¹⁸⁸*Id.* at § 1502.9.

¹⁸⁹*Id.* at § 1503.1.

¹⁹⁰*Id.* at § 1503.4.

¹⁹¹*Id.* at §§ 1503.4(a)(1)-(5).

¹⁹²*Id.* at § 1506.6, "Public Involvement."

¹⁹³*Id.* at § 1500.1.

¹⁹⁴*Id.* at § 1500.2(f).

¹⁹⁵*Id.* at §§ 1502.2 and 1502.7.

¹⁹⁶*Id.* at § 1502.21.

¹⁹⁷*Id.* at § 1502.1.

¹⁹⁸*Id.* at § 1502.14.

¹⁹⁹*Id.* at § 1504.13.

²⁰⁰*Id.* at § 1504.3(f).

²⁰¹*Id.* at §§ 1504.1 - .3.

²⁰²*Id.* at § 1506.1.

²⁰³*Id.* at § 1506.2.

²⁰⁴*Id.* at § 1506.3.

²⁰⁵*Id.* at § 1506.4.

²⁰⁶*Id.* at § 1507.

²⁰⁷*Id.* at § 1507.3.

²⁰⁸*Id.* at § 1505.

²⁰⁹*Id.* at § 1505.2.

²¹⁰582 F.2d 77 (1st Cir.), *cert. denied*, 99 S. Ct. 721 (1978).

²¹¹*Id.* at 79.

²¹²590 F.2d 39 (2d Cir. 1978).

²¹³*Id.* at 43.

²¹⁴*Id.* at 44.

²¹⁵*Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 100 S. Ct. 497 (1980).

²¹⁶*Id.*

²¹⁷The Forest Service is still preparing its regulations to conform its procedure with the CEQ Final NEPA Regulations. ___ BNA ENV'T RPT'R (Curr. Dev. ___ (June 1981)).

²¹⁸5 U.S.C. § 702 (1976).

²¹⁹*See, e.g.*, California v. Bergland, ___ F. Supp. ___, 13 ERC 2203 (E.D. Ca. 1980).

V. Administrative Law and Judicial Review

The following discussion of administrative law and judicial review considers several basic matters. First, Part A focuses on the requirements for obtaining judicial review of federal agency action.¹ Federal law contains certain jurisdictional and procedural requirements which must be satisfied before any challenge to agency action may be entertained by a federal court.² Parts B-D examine the procedures an agency must follow in taking valid agency action. Specific attention is given to the requirements for informal rulemaking, formal rulemaking, and adjudications. Parts B-D provide a background for Part E. The standards a court must follow in reviewing agency action depend in part on whether the agency followed the proper procedures discussed in Parts B-D. Part E examines the extent to which, if any, a court may substitute its judgment for that of the agency whose action is under attack in litigation.

Most of the discussion in Chapter V applies, unless otherwise indicated, to the Forest Service, as well as other federal agencies. The Administrative Procedure Act (APA)³ plays a major role in federal administrative law and judicial review. The APA is the focal point of much of the discussion. The procedural aspects of the National Forest Management Act (NFMA)⁴ are discussed, where appropriate, in Chapter V. NFMA is particularly important since it requires the Forest Service to formulate procedures and rules governing the planning and management functions for the NFS.

A. JUDICIAL REVIEW OF AGENCY ACTION -- THE ADMINISTRATIVE PROCEDURE ACT

1. Subject Matter Jurisdiction

Unless a federal court has subject matter jurisdiction, it lacks the power to act or enter a valid judgment. Subject matter jurisdiction refers to the power of the court to entertain a particular kind of controversy. Article III of the Constitution limits the subject matter jurisdiction of federal courts to certain types of suits, such as cases between citizens of different states or actions involving issues of federal law. Even where a particular suit falls within Article III, jurisdiction is lacking unless Congress has passed a statute expressly vesting the federal courts with jurisdiction of the particular type of lawsuit.⁵

Two issues frequently arise regarding federal subject matter jurisdiction over suits against federal agencies: whether the plaintiff has standing to sue, and, apart from the standing issue,

whether a federal statute exists which vests the federal court with jurisdiction of the particular type of lawsuit.

(a) Statutory Jurisdiction

Until recently⁶ the federal courts were divided on the question whether section 702 of the APA⁷ provides an independent grant of federal subject matter jurisdiction. The first sentence of section 702 provides:

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.⁸

In Califano v. Sanders⁹ the Supreme Court held that section 702 does not contain an independent grant of federal subject matter jurisdiction. The lower courts had been divided on this question.¹⁰ Even the Supreme Court had apparently assumed in prior decisions that section 702 was a jurisdictional grant. But the Court believed that the 1976 amendment of 28 U.S.C. § 1331--eliminating the amount-in-controversy requirement for suits brought against the United States, its agencies, or its officers or employees acting in their official capacity--undercut the rationale for construing the APA as an independent jurisdictional grant.¹¹ Moreover, a narrow interpretation of the language of section 702 ("is entitled to judicial review thereof") is consistent with section 703, which provides that review is to proceed "in a court specified by statute" or "in a court of competent jurisdiction."¹²

A casual reading of Sanders might suggest that the Court's narrow interpretation of section 702 will affect a plaintiff's access to federal court review of agency action due to the expansive 1976 amendment of 28 U.S.C. § 1331. The Supreme Court went on to hold, however, that jurisdiction under section 1331 was unavailable in the Sanders case because the Social Security Act's special subject matter jurisdictional grant is exclusive.¹³ Judicial review under § 205(g) is quite narrow.¹⁴ (The 1976 amendments to section 702 of the APA do not affect the Sanders decision.) In the overwhelming majority of suits against federal agencies and officials, however, section 1331 would be available to satisfy the subject matter jurisdiction requirement.¹⁵

* The footnotes for Chapter V begin on p. 173.

(b) Standing

The first sentence of section 702 functions as the general statutory standing provision for judicial review of all agency action.¹⁷ The Supreme Court cases on this subject are legion, but three serve to illustrate the Court's current view regarding standing to challenge agency action: Association of Data Processing Service Organizations, Inc. v. Camp,¹⁸ Sierra Club v. Morton,¹⁹ and United States v. S.C.R.A.P.²⁰

In Camp the Court reiterated its long-held view that the "case or controversy" requirement of Article III of the Constitution includes a showing by the plaintiff of an injury-in-fact, *i.e.*, an actual injury. Section 702 of the APA restates this requirement as "adversely affected or aggrieved by agency action." But section 702 also requires that the plaintiff show that this injury is "within the meaning of a relevant statute." In Camp the Court held that this additional, non-constitutional standing requirement obliges the plaintiff to show that the interest he seeks to protect is arguably within the zone of interests to be protected or regulated by the statute relied on.

The plaintiff in Camp, a data processing service company, attacked the validity of a ruling of the Comptroller of Currency authorizing national banks to make their data processing services and equipment available to other banks. The plaintiff alleged that the ruling violated the Banking Service Corporation Act, which provides: "No bank service corporation may engage in any activity other than the performance of bank services for banks."²¹ The Court held that the plaintiff, as a competitor of the national banks, was arguably within the zone of interests Congress sought to protect by this provision of the Bank Services Corporation Act. It thus had standing under section 702 to challenge the Comptroller's ruling.²²

The lower federal courts have occasionally struggled with the nonconstitutional standing requirement of section 702. For example, competing utilities were held to have standing to attack TVA contracts, since the statute relied on is arguably intended to protect private utilities from that competition.²³ But neighboring property owners were held to lack standing to challenge the sale of a military airfield for construction of a power plant, on ground the statute relied on did not include the property owners within its zone of interests.²⁴

The Sierra Club court reemphasized the constitutional, *i.e.*, actual injury requirement, of standing. The Court expressly recognized that a non-economic, non-physical injury, such as an injury to esthetic values, is sufficient to satisfy the actual injury requirement. In Sierra Club the alleged injury was to plaintiff's environmental values.²⁵

While the Court in Sierra Club clarified the type of actual injuries that satisfy the standing

requirement, it did not address the issue of how substantial an actual injury must be. This issue was decided in the S.C.R.A.P. case. There the Court rejected a challenge to the substantiality of the alleged injury and held that "an identifiable trifle" was sufficient for standing.²⁶

It should be emphasized that Camp, Sierra Club, and S.C.R.A.P. deal with standing under the APA where no other statute expressly covers the suit. For example, the citizen suit provision of the Clean Air Act provides that suits to enjoin violations of the Act may be brought by "any person."²⁷ Not only does this provision relieve the plaintiff from showing the agency action violates a statute that includes him within its zone of interests, it raises a question of its constitutionality. Because the Supreme Court has held that the Constitution requires a showing of an actual injury to the plaintiff,²⁸ the Tenth Circuit has suggested that the Clean Air Act may be unconstitutional in this respect.²⁹ The District of Columbia Circuit Court, however, has upheld its validity.³⁰

On further analysis, it would seem that Congress may, as it did in the Clean Air Act, validly allow plaintiffs to sue, in effect, as "private" attorneys general, even though they fail to show that they themselves were actually injured. For example, in Sierra Club v. Morton the Court said: "Where a dispute is otherwise justifiable, the question whether a litigant is a 'proper party to request an adjudication of a particular issue' . . . is one within the powers of Congress to determine."³¹ Moreover, it would seem that if *qui tam* actions by informers and *parens patriae* suits by states are valid, so are congressional statutes which allow any person to sue to enforce congressional acts, *i.e.*, without requiring a clear showing of an actual injury to the plaintiff.³² Finally, any doubt as to the authority of Congress to extend standing to persons who are not actually injured themselves was apparently laid to rest in Warth v. Seldin.³³

Congress may create a statutory right or entitlement the alleged deprivation of which can confer standing to sue even where the plaintiff would have suffered no judicially cognizable injury in the absence of statute

In the absence, however, of an express federal statute which confers standing on persons, regardless of any actual injury to themselves, the requirements of Camp, Sierra Club, and S.C.R.A.P. must be satisfied. First, the plaintiff must allege an actual injury to himself, and second, the interest the plaintiff seeks to protect from the challenged agency must be arguably within the zone of interests intended to be protected by the statute relied upon.

2. Personal Jurisdiction Over the Agency or Agency Official

Even where a court has subject matter jurisdiction of a particular lawsuit, a defendant is entitled to a dismissal upon a proper and timely motion³⁴ if the court does not have personal jurisdiction over the defendant. Issues of personal jurisdiction focus on whether the court can validly subject the particular defendant to litigation and a subsequent judgment. Issues of personal jurisdiction frequently raise complex statutory and constitutional questions. In suits against federal agencies or officers, however, the requirements of personal jurisdiction are relatively easy to satisfy. The Judicial Code provides that where a suit is brought in a federal district court of proper venue,³⁵ personal jurisdiction exists provided that the defendant agency or federal officer is served in a manner or mode provided by the Federal Rules of Civil Procedure.³⁶ The applicable federal rule requires that a copy of the summons and the complaint be delivered to the defendant federal agency or officer.³⁷

If service is made beyond the territorial limits of the district in which the action is brought, delivery of the summons and complaint may be made by certified mail.³⁸

3. Venue

Venue refers to the proper federal district in which a federal lawsuit may be brought. Even where subject matter and personal jurisdiction exist, venue requirements must be satisfied. As previously discussed, normally federal subject matter jurisdiction will exist over suits against federal agencies or officers since the claims are based on federal law.³⁹ And if the proper method of service is used, personal jurisdiction can be obtained over a federal agency or officer in any federal district court.⁴⁰ Congress, however, realizing it would be unfair to require federal agencies or officers to defend against suits brought in any federal district court of the plaintiff's choosing, limited venue to the district in which the defendant resides, the cause of action arose, or any real property involved in the action is situated. If the lawsuit does not involve real property, venue is also proper in the district where the plaintiff resides.⁴¹ Since most suits against the Forest Service will involve NFS lands, *i.e.*, real property, those suits cannot be brought in the district where the plaintiff resides. Venue is proper, however, in any district where the real property is located. If the property involved in the action is located in two or more districts, the plaintiff may bring suit in any of these districts.⁴² Venue is also proper in the district where a defendant resides. Since the Forest Service resides in the District of Columbia, any suit in which the Forest Service is a defendant may be brought in the federal district court for the District of Columbia. If a Forest Service officer or employee is joined as

an additional defendant and that person resides in another district, *e.g.*, in Maryland or Virginia, suit may also be brought in the district of his residence.

The 1976 amendments to the general venue statute for suits against the United States, its agencies, officers, or employees⁴³ added the following provision.

. . . Additional persons may be joined as parties to any such action in accordance with the Federal Rules of Civil Procedure and with such other venue requirements as would be applicable if the United States or one of its officers, employees, or agencies were not a party.

Prior to the 1976 amendment the venue statute had been interpreted by a substantial number of federal courts as preventing the additional joinder of non-governmental party defendants in such suits.⁴⁴ In the opinion of some courts, however, this restriction served no legitimate purposes, and in many cases--particular public land controversies--prevented a full and satisfactory resolution of the disputes.⁴⁵ The 1976 amendment to section 139 (e) adopts the opposing view. Now additional parties may be joined in accordance with the joinder rules and venue requirements which would be applicable if no government entities or parties were joined.⁴⁶

4. Sovereign Immunity

The defense of federal sovereign immunity is easy enough to understand: the United States may not be sued unless Congress expressly waives the defense of immunity by statute. Application of the defense in actual cases, however, has been consistent only where a monetary recovery from a federal government has been sought. Where equitable relief has been sought, confusion has reigned.

The courts have fashioned a narrow exception to the rule that sovereign immunity can only be waived by congressional statute. Where the constitutional validity of a federal statute is challenged, and only a declaration of unconstitutionality and/or a prohibitory injunction is sought, the plaintiff can sue the federal officer responsible for enforcement of the statute without joining the United States as a defendant. The officer is deemed to have acted in his individual capacity, and thus the suit is really only against the officer, not the government.⁴⁷ This exception to sovereign immunity is actually based on a fiction, since it applies even where the federal officer has merely enforced the statute according to its terms, *i.e.*, where the officer is acting within the scope of statutory authority. It would seem that the United States should be a necessary party defendant in a suit to declare one of its statutes

unconstitutional. Moreover, it is well settled that the fact that the United States is not actually named or joined as a party defendant does not affect the applicability of the defense of sovereign immunity; it can be invoked if the suit should have been brought against the United States.⁴⁸ The fiction of deeming the suit only against the officer individually is necessary, however, to enable courts to review the constitutionality of federal statutes. Congress has not enacted a statute waiving sovereign immunity of the United States from suits attacking the validity of federal statutes.

Two other important classes of cases in which the defense of sovereign immunity is unavailable are: (1) suits to enjoin acts of officers who act outside their statutory authority; and (2) suits for mandamus⁴⁹ against officers to compel performance of a nondiscretionary ministerial duty owed to the plaintiff. Where an officer has acted outside his statutory authority, the defense of sovereign immunity is not applicable, since the suit is actually against him individually and not the sovereign. Suits for mandamus relief are expressly authorized by statute,⁵⁰ so the defense of sovereign immunity, even assuming it would otherwise be applicable, has been waived by Congress. Mandamus suits are discussed in detail elsewhere in this chapter.⁵¹

The cases producing the greatest confusion over the scope of sovereign immunity typically involve suits for equitable relief (usually mandatory orders, such as specific performances of a contract) where the validity of express statutes or rules is not involved; where no clear nondiscretionary duty is owed the petitioner; and where the officer is acting within his broad scope of statutory authority, but has breached a general rule of law, such as contract or tort.⁵²

Prior to the 1976 amendments to section 702 of the APA, the circuit courts were split on the question whether section 702⁵³ constituted a waiver of sovereign immunity from suits complaining of agency action or inaction.⁵⁴ The 1976 amendments were intended to remove much of this confusion by partially abolishing the doctrine of sovereign immunity.⁵⁵

Section 72 provides:

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States

or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: Provided, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review of the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

The first sentence remains unchanged and is discussed elsewhere.⁵⁶ The succeeding sentences were added by the 1976 amendment.

If section 702's waiver provision is applicable, one might assume that the amendment avoids the confusion and uncertainty of cases like Larson v. Domestic and Foreign Commerce Corp.⁵⁷ There the plaintiff sued the head of the U.S. War Assets Administration for specific performance of a contract to deliver coal. The contract was with the United States and not the officer individually, and the officer had no personal interest in the coal. While money damages might have been an available remedy for breach of contract in a Tucker Act action,⁵⁸ that Act has been construed not to provide for equitable relief.⁵⁹ Since no statutory waiver of sovereign immunity existed, plaintiff's only hope was to convince the court that sovereign immunity did not apply. No argument was made that an unconstitutional federal statute was involved; therefore the exception to sovereign immunity based on the fiction that the suit is only against the officer individually did not apply.⁶⁰

The plaintiff's main argument was that the defendant officer had acted outside his statutory authority. After all, it would have seemed that no one could seriously contend that his authority included refusing to perform valid contractual obligations of the government. The Supreme Court, however, refused to hold the defendant acted outside his statutory powers:

We hold that if the actions of an officer do not conflict with the terms of his valid statutory authority, then they are the actions of the sovereign whether or not they are tortious under general law if they would be regarded as the actions of a private principal under normal rules of agency. A government officer is not thereby immunized from liability, if his action is such

that liability would be imposed by the general law of torts. But the action itself cannot be enjoined or directed, since it is also the action of the sovereign.⁶¹

Thus Larson stands for the proposition that, where a federal officer is acting within the scope of his general statutory authority (in Larson, administering government contracts), and that statutory authority and the officer's actions are constitutionally valid, then absent an express statutory waiver of sovereign immunity, the suit cannot be brought, and, of course, the relief cannot be granted. It matters not that the action pursued by the officer is unlawful under "general" law (in the case of Larson, a breach of contract). Had the Larson suit arose after the 1976 amendments to section 702, the government's sovereign immunity defense would have been rejected, because section 702 expressly abolishes the sovereign immunity defense to claims for equitable relief. The 1976 amendments, however, also added provisions which cast doubt on whether the plaintiff in Larson ultimately could have obtained the equitable relief sought. These provisions of the 1976 amendments are discussed below.⁶²

Perhaps the best way to describe the waiver of sovereign immunity provided in the second sentence of section 702 is to discuss its limited application. First, the waiver of sovereign immunity is limited to suits for equitable relief, i.e., "relief other than money damages." Where money damages are sought, some other statutory waiver must be available such as the Federal Tort Claims Act⁶³ or the Tucker Act.⁶⁴ Second, the consent to suit is limited to actions in federal courts. Third, the waiver of immunity does not cover agencies exempted in section 701(b)(1), such as Congress, courts of the United States, and the government of the District of Columbia.

5. Official Immunity

The question whether an action against the United States is barred under the rules of sovereign immunity is technically separate from the question whether a federal official or employee is personally liable in any action brought against him individually. Whether an individual federal official or employee is liable turns on whether the defendant can successfully invoke the defense of official immunity. Official immunity depends on the type of relief sought (mandatory injunction, prohibitory injunction, or damages), whether a constitutional violation is involved, and whether the defendant is classified as a "prosecutor," "judge," or mere official or employee.

(a) Mandamus

Mandamus is a type of mandatory injunction which may be ordered by a court where the plaintiff proves that the defendant governmental official has failed to perform a non-discretionary

ministerial duty owed to the plaintiff. For example, mandamus was available to compel the Secretary of HEW to pay funds to Minnesota to finance certain social security programs where the relevant federal statute provided that the Secretary of the Treasury "... [f]rom the sums appropriated therefor ... shall pay to each state which has an approved plan for aid and services to needy families with children ... 75% of so much ... " as the state expends therefor.⁶⁶ Mandamus was unavailable, however, to compel the Secretary of Interior, the Director of the National Parks Service, or the superintendent of an individual park to remove certain obstacles and barriers erected across park access roads. The court found that a discretionary function was involved since the duty to remove the obstacles and barriers depended, *inter alia*, on the interpretation of a deed and other documents involved in the acquisition of property by the government.⁶⁷

If mandamus relief is available, the defense of sovereign immunity, as well as official immunity, does not apply.⁶⁸ Where a court denies a petition for mandamus, the court's action is tantamount to a recognition of official immunity. Most courts, however, do not expressly base the denial of mandamus on official immunity grounds. The courts usually state that the reason the request for mandamus is denied is that subject matter jurisdiction under the mandamus jurisdiction statute⁶⁹ is lacking or simply the relief sought in the particular case is outside the scope of the mandamus remedy.

(b) Mandatory Injunctions Other Than Mandamus

As already discussed,⁷⁰ generally, mandamus relief will lie only if the defendant officer or agency owes the plaintiff a clear statutory duty.⁷¹ A mandatory injunction (other than mandamus) may still be available, however, where the defendant has a duty to the plaintiff which arises under general law, e.g., tort, contract, or property. But where the defendant has acted within his general statutory authority or duties, mandatory equitable relief is available only if granting of relief will not affect property belonging to the United States in a suit where sovereign immunity would bar a suit directly against the United States.⁷² For example, the plaintiff may seek specific performance of his contract with a federal agency to deliver to him government surplus property on ground an agency official has breached that contract. Since the relief, if granted, will necessarily affect property belonging to the United States, specific performance is available only if sovereign immunity would not be a bar had the plaintiff sued the United States directly.⁷³ This problem is discussed at length above.⁷⁴ The effect the 1976 amendments to the APA have on this problem is discussed below.⁷⁵

(c) Prohibitory Injunctions: Constitutional and Non-Constitutional Violations

The discussion above⁷⁶ regarding mandatory injunctions other than mandamus theoretically applies to prohibitory injunctions as well. Success in raising the defense of sovereign immunity will be more difficult to achieve, however, since a prohibitory injunction is less likely than a mandatory injunction to affect the status quo of government property.⁷⁷

Where the claim is based on a constitutional violation, however, an officer clearly has no official immunity from prohibitory injunctive relief--even where the official is carrying out the mandate of a statute.⁷⁸ The Supreme Court has reasoned that official immunity is not a bar since the officer is considered to have acted "individually."⁷⁹ The defense of sovereign immunity is also unavailable.⁸⁰

(d) Damages; Constitutional and Non-Constitutional Violations

In the area of official immunity, the Supreme Court has devoted most of its attention to suits where money damages are sought. The Court's concern is understandable, since, unlike mandatory equitable relief (including mandamus) or prohibitory injunctions, a money damages judgment against an official individually could literally bankrupt the defendant. In Barr v. Matteo⁸¹ the Supreme Court said that in a suit for money damages, official immunity would bar relief if the defendant official proved: (1) that he acted within the "outer perimeter of [his] line of duty" and the action was "an appropriate exercise of the discretion which an officer of that rank must possess if the public is to function effectively."⁸² In other words, the defendant has absolute immunity if he can show that he acted within his statutory authority or duty and was performing a discretionary function.⁸³ If, for example, the defendant officer is conducting an arrest at the time the alleged violation occurred, the Barr absolute immunity does not apply, because arrest is not a discretionary function.⁸⁴ Or, where a constitutional violation has occurred, the Barr absolute immunity is not available, because the Constitution, as well as any applicable congressional statutes, delimit an official's authority.⁸⁵

Even where the Barr absolute immunity does not apply, a qualified immunity may be available. Where a constitutional violation has occurred, the defendant is still immune from a money damages judgment unless: the defendant actually knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the plaintiff; or the defendant's actions were malicious.⁸⁶ Suppose that the plaintiff is unable to prove that the defendant's actions were malicious or that he actually knew he was violating the plaintiff's constitutional rights.

Under such circumstances, the plaintiff can still avoid the official immunity bar by proving that the defendant "should have known" that his acts were unconstitutional. The Supreme Court has held that this requires proof that the constitutional right violated was "clearly established" at the time of the violation.⁸⁷

The Supreme Court has applied the qualified official immunity test only in cases alleging constitutional violations. The Court has not considered the qualified official immunity test in cases alleging that, while the defendant's actions were constitutional (i.e., he did not exceed his statutory authority), he failed to perform a nondiscretionary function. In Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics⁸⁸ a constitutional violation was alleged, but the Second Circuit found the Barr absolute immunity unavailable because the defendant was not performing a discretionary function.⁸⁹ In Bivens the defendant officers allegedly violated the plaintiffs' Fourth Amendment rights against unreasonable searches and seizures.⁹⁰ The court held that the qualified official immunity applied if any defendant could allege and prove that he believed in good faith that his conduct was lawful and that his belief was reasonable.⁹¹

(e) Official Immunity Depends on Whether the Defendant is a "Mere" Official, "Prosecutor," or "Judge"

All judges acting within their judicial jurisdiction are absolutely immune from liability for torts, even if committed maliciously and in bad faith.⁹² (The Supreme Court has suggested in dictum, however, that judges are not generally immune where their conduct violates a criminal statute.)⁹³ Similarly, all prosecutors, while not immune from criminal prosecution or disbarment, enjoy the same absolute immunity from civil liability where their acts are intimately associated with the judicial phase of the criminal process.⁹⁴ This same absolute immunity from civil liability extends to grant jurors,⁹⁵ petit jurors,⁹⁶ and witnesses.⁹⁷

While the above categories--judge, prosecutor, juror, and witness--would not appear to include agency officials, the Supreme Court recently extended by analogy this absolute immunity to agency officials and attorneys when discharging certain functions. In Butz v. Economou⁹⁸ the plaintiff, who was at one time registered with the Department of Agriculture as a commodity future commission merchant, filed suit alleging numerous constitutional violations arising out of an adjudicatory proceeding⁹⁹ in which the USDA sought to revoke or suspend plaintiff's registration. Named as defendants were the Secretary, the Assistant Secretary, the Judicial Officer, the Chief Hearing Examiner, the USDA attorney who had prosecuted the enforcement proceeding, and several officials in the

Commodity Exchange Authority. The Supreme Court held that agency law judges, such as hearing examiners, enjoy the same absolute immunity as judges in traditional courts of law. Although an agency adjudication is not a criminal proceeding, the Court also held that agency attorneys handling the adjudicatory proceeding and other officers who participate in the decision to initiate or terminate administrative adjudications, enjoy absolute prosecutorial immunity. Any officers not falling within these two categories are relegated to the official immunity defenses discussed above.¹⁰⁰

6. Presumption of Reviewability

A common argument against federal court review of agency action has been that, since the organic statutes relating to the particular agency in question do not expressly authorize judicial review (either generally or of the particular action sought to be reviewed), the court should infer that Congress intended to withhold review. A primary purpose of the first sentence of section 702 of the APA¹⁰¹ is to create a presumption in favor of review. The Supreme Court has held that "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review."¹⁰² This purpose is further evidenced by section 704 of the APA which specifically provides not only for review of "[a]gency action made reviewable by statute" but also review of "final agency action for which there is no other adequate remedy in a court."¹⁰³ A few statutes expressly exclude judicial review under the EPA. For example, Renegotiation Board actions may not be reviewed under the APA, except for public information issues under section 552.¹⁰⁴ And even though a suit is not completely barred, the particular relief sought may be expressly prohibited by statute. For example, regarding tax suits, 28 U.S.C. § 2201 bars declaratory relief with respect to most federal tax matters.¹⁰⁵ Regarding tort claims, the Tort Claims Act expressly excludes certain tort claims against the government. Section 2680 of the Act catalogs over fourteen exclusions.¹⁰⁶ Moreover, section 2679 of the Act provides that it is the exclusive remedy for claims "cognizable under section 1346(b)," *i.e.*, money damages for tortious governmental actions.¹⁰⁷ As discussed below, the 1976 amendments to the APA, however, may affect the prior decisional law.¹⁰⁸

7. Effect of the 1976 Amendment to Section 702

The 1976 amendment to section 702 added the following provision, which appears as the last sentence of that section:

Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground;

or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

The part of the 1976 amendment quoted above codifies part of the existing case law, *i.e.*, that section 702 creates a presumption in favor of judicial review of agency action; but where expressly prohibited by statute, judicial review is unavailable.¹⁰⁹

The question becomes, however, whether the 1976 amendment constricts judicial review beyond the pre-1976 point by providing: "Nothing herein . . . (2) confers authority to grant relief if any other statute that grants consent to suit . . . impliedly forbids the relief which is sought."¹¹⁰ The legislative history suggests the following examples:

For example, in the Court of Claims Act, Congress created a damage remedy for contract claims with jurisdiction limited to the Court of Claims except in suits for less than \$10,000. The measure is intended to foreclose specific performance of government contracts. In the terms of the proviso, a statute granting consent to suit, *i.e.*, the Tucker Act, "impliedly forbids" relief other than the remedy provided by the Act. Thus, the partial abolition of sovereign immunity brought about by this bill does not change existing limitations on specific relief, if any, derived from statutes dealing with such matters as governmental contracts, as well as patent infringement, tort claims, and tax claims.

. . .

Clause (2) of the proviso does not withdraw specific relief in any situation in which it is now available. It merely provides that new authority to grant specific relief is not conferred when Congress has dealt in particularity with a claim and intended a specified remedy to be the exclusive remedy.¹¹¹

If the courts adopt this legislative view, the proviso in section 702 may take away what section 702's general provision had apparently given in abolishing sovereign immunity to equitable relief. The result in the *Larson* case¹¹² would, in effect, retain vitality. The ground for the result reached there (sovereign immunity bars equitable contractual relief) is no longer viable under the 1976 amendment, but the result (dismissal of the suit) would occur on the ground that the Tucker Act impliedly forbids equitable relief. The legislative view quoted above assumes that the Tucker Act, by providing only for money damages in contract suits against the government, impliedly forbids equitable

relief. Carried to its extreme, this legislative view would render the waiver of sovereign immunity in section 702 nugatory. This view seems to be that since Congress has expressly provided for certain types of relief on certain types of claims, it must have intended that all claims and relief not expressly included should not be allowed.

The first part of the sentence in the 1976 amendment quoted above provides: "Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground. . . ." Actually, this part of the amendment adds nothing new, but merely emphasizes well accepted principles. For example, relief may be denied on traditional equitable principles. The Court may conclude that after comparing or balancing the equities, the requested relief should be denied since undue hardship to the defendant would result. Another equitable principle is that equitable relief may be denied if the plaintiff has an adequate remedy at law.

8. The Requirements of Section 704

Section 704 of the APA requires, that to obtain judicial review, agency action must be final.¹¹³ In general, however, the federal courts have taken a flexible and even somewhat lenient approach to the finality requirement.¹¹⁴

Generally, a plaintiff, as a prerequisite to judicial review, also must exhaust any administrative remedy he may have.¹¹⁵ Section 704 provides, however, that unless expressly required by statute, a plaintiff is not required to request the agency to reconsider its decision or to grant a rehearing.¹¹⁶ The exhaustion requirement requires that the plaintiff appeal to a higher agency authority, if appeal is provided for by statute or agency rule. Section 704 provides, however, that appeal to a higher agency authority is required only if the agency provides by rule that the lower agency decision is inoperative during the pendency of the appeal.¹¹⁷

If an alternative judicial proceeding is available to consider the requested relief, then section 704 bars judicial review under the APA in the federal district court.¹¹⁸ For example, 28 U.S.C. §§ 2341-2353 provides for judicial review of certain agency actions¹¹⁹ in the federal court of appeals, instead of in the district court under the APA. Money damages claims against an agency (as opposed to against agency officials individually) must be brought under the Tort Claims Act, rather than under the APA.¹²⁰ Similarly, a money damages claim sounding in contract must be brought under the Tucker Act.¹²¹

9. Joinder and Misjoinder Problems Solved by the 1976 Amendments

Section 703 of the APA was amended in 1976 to simplify technical complexities concerning naming

the proper party defendant in actions challenging federal administrative action. Delays and dismissals for improper joinder of or failure to join proper or necessary defendants have frequently plagued plaintiffs in suits complaining of federal agency action. For example, a plaintiff is sometimes uncertain whether he may, should, or must formally join one or more of the following parties: the United States; the federal agency as an entity; the head of the agency; or any lower officers and employees in the chain of command, down to the employee who actually committed the act or omission. Frequently, the identity of the actual individual employees involved or directly responsible is unknown to the plaintiff. A sentence was added to section 703 which provides:

If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer.

The first clause of the sentence refers to any special statutory restriction on naming defendants. For example, any litigation involving actions of the Tennessee Valley Authority must be brought against that agency only in its name.¹²² If no such applicable statutory restriction exists, however, the plaintiff now has the three choices set out in amended section 703.

It should be noted that section 702 provides that "a judgment or decree may be entered against the United States." Presumably, this is proper even where the plaintiff has not named the United States formally as defendant, rather only the agency or appropriate officer. On the other hand, even though the appropriate officer need not be named as defendant, and judgment may be formally entered against the United States, section 702 further provides that "any mandatory or injunctive decree shall specify the Federal officer or officers (by name and by title), and their successors in office, personally responsible for compliance." Significantly, however, section 703 relieves the plaintiff of the burden of possessing or demonstrating this knowledge when the action is instituted by correctly naming these particular officers as defendants in the complaint.

B. RULEMAKING VERSUS ADJUDICATION

The exercise of a federal agency's powers or functions can be characterized as either quasi-legislative or quasi-judicial. The function of an agency promulgating a rule is analogous to the function of a legislature enacting a statute. Both an agency rule and a legislative statute usually (1) express requirements based on policy decisions; (2) are directed to a broad class of persons, rather than specific individuals; and (3) apply prospectively only, i.e., apply to events occurring after their promulgation or enactment. On the other hand, an agency, unlike a legislature, is governed by

legislative statutes. Only a legislature can amend or repeal its statutes, not the agency subject to the statutes. Hence an agency's rule-making function is only quasi-judicial.

The function of an agency in conducting an adjudication is analagous to the judiciary conducting a trial in a court of law. Basically, an agency adjudication is a rule-enforcement proceeding. In conducting an adjudication, an agency has certain powers. These powers include the power to investigate alleged violations, to initiate enforcement proceedings against named parties, to conduct trial-type hearings, and to make specific findings. If an agency decides that a violation of a rule has occurred, the agency has the power to impose certain sanctions against a named party, such as an injunction or fine.

An agency adjudication, however, is usually more informal and less restricted¹²⁴ than a court trial. Moreover, most agency enforcement decisions and sanctions are reviewable by a court of law.¹²³ Also, a court, unlike an agency, lacks the power to investigate and prosecute alleged violations. Hence an agency's function of conducting an adjudication is only quasi-judicial. The legislative history of the APA reflects that Congress recognized the quasi-legislative and quasi-judicial characteristics of agency functions:

. . . [T]he bill carefully distinguishes between the so-called legislative functions of administrative agencies (where they issue general regulations) and their judicial functions (in which they determine rights of liabilities in particular cases). It provides quite different procedures for the "legislative" and "judicial" functions of administrative agencies.¹²⁶

The quasi-legislative and quasi-judicial characteristics of an agency's functions are generally helpful in describing and contrasting the agency functions of rulemaking and adjudication, but these characterizations are of limited utility. Whether a federal agency is required to conduct an adjudication, rather than a rule-making proceeding is often difficult to determine.¹²⁷ This determination is important, however, because generally the APA requires more formality and affords greater procedural safeguards for affected persons when an adjudication,¹²⁸ rather than rulemaking,¹²⁹ is required.¹³⁰ The requirements for rulemaking provide fewer individual safeguards, but the process is faster and demands fewer agency resources.¹³¹

Most agency rulemaking is governed by a set of informal procedures under the APA.¹³² This rulemaking function is referred to as "informal" rulemaking. In promulgating some rules, however, the agency is required to follow the same formal APA procedures that apply to an adjudication.¹³³ This rulemaking function is referred to as "formal" rulemaking. The function of formal rulemaking and adjudication thus overlap since both are governed by the same procedures.

Determining whether an agency is purporting to adjudicate or make rules is complicated because an agency has the choice of making any rule through the process of adjudication. In other words, rules that are subject only to informal rulemaking requirements may be adopted through the process of adjudication, as well as through the informal rulemaking process.¹³⁴ An agency, however, may not adjudicate or adopt formal rules through the informal rulemaking process.¹³⁵ Finally, judicial review of informal rules is much more limited than that of formal rules or adjudicatory orders.¹³⁶

1. Informal and Formal Rulemaking

Generally, the basic function of any agency rule--whether informal or formal--is the same.¹³⁷ An informal rule cannot be substantively distinguished from a formal rule. In adopting an informal rule, however, an agency is required only to follow the informal rulemaking procedure of the APA.¹³⁸ In adopting a formal rule, the procedures governing adjudications must be observed.

Section 553(c) states how to determine when the adjudicatory procedures must be followed in rulemaking.

When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

In United States v. Florida East Coast Ry. Co.¹³⁹ the Supreme Court held that the language of the Interstate Commerce Act "after hearing" did not trigger the adjudication requirements referred to in section 553(c). The Court did acknowledge, however, that "on the record after opportunity from agency hearing" were not words of art, so that besides this specific language other statutory wording might trigger the adjudication requirements.¹⁴⁰ Thus unless section 553(c) applies, or some other statute expressly requires that the adjudicatory procedures govern, the informal rulemaking procedures of the APA may be followed in adopting rules.¹⁴¹

2. Determining Whether an Adjudication Is Required

(a) The APA Definitions of Rulemaking and Adjudication

As previously mentioned,¹⁴² a troublesome issue, which frequently arises in judicial review of agency action, is whether the agency is required to follow the section 553 procedures for informal rulemaking¹⁴³ or the sections 554-557 procedures for formal rulemaking and adjudication.¹⁴⁴ The APA defines "rule making" as "agency process for formulating, amending, or repealing a rule."¹⁴⁵ A "rule" is defined

essentially as ". . . an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedures, or practice requirements of an agency"146 "Adjudication" is defined as "agency process for the formulation of an order."147 And an "order" is ". . . a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule-making including licensed."148

On the one hand, the APA definitions of a rule and an order are mutually exclusive, since an order is "a final disposition . . . of an agency in a matter other than rule making"149 On the other hand, the descriptive language of the definition of an order--"a final disposition, whether affirmative, negative, injunctive, or declaratory in form"150--is so broad that an order would seem to include any agency disposition. Because it is so broad, the APA definition of an order offers little help in drawing the line between an order and a rule. Moreover, while the APA definition of a rule states that it has only prospective effect, an order can have prospective, as well as retroactive effect. Indeed, an injunction is included within the APA definition of an order, and an injunction has only prospective effect.151 And section 551(d) defines an order as including an agency disposition which is declaratory in form. Thus an agency action cannot always be accurately labeled as an order on a rule merely by determining its effect is prospective only.152

A final example illustrates why the APA definitions are of little help. An adjudication is a proceeding brought against particular named parties,153 and an order is normally154 directed against a named party in the adjudication. But the APA definition of a rule says that a rule can also be directed toward a named person. Section 551(4) provides that a rule includes "an agency statement of general or particular applicability."155 Following this definition of a rule, it would be difficult to distinguish between a rule and an order on the basis of whether the agency statement or decision is directed only to named persons.

(b) Judicial Approaches for Determining Whether an Adjudication Is Required

Since the APA definitions of a rule and an order overlap and are confusing,156 the courts have devised their own approaches or tests for determining whether an agency is required to conduct an adjudication. Two old Supreme Court cases are frequently relied on by the courts to determine the line between informal rulemaking and an adjudication by a federal agency. In Londoner v. Denver,157 a landowner had objected to a paving assessment by the city taxing authorities. The Supreme Court held that the assessment was invalid because the city tax agency had failed to conduct an adjudication, i.e., hold a trial-type hearing

and provide an opportunity for the landowner to present evidence, including oral testimony. The Court held that adjudicatory procedures were required because the tax assessments were made by the agency on a case-by-case basis. In the other case, Bi-Metallic Investment Co. v. State Board of Equalization,158 the Supreme Court held that a city tax agency was not required to conduct an adjudication prior to making an across-the-board increase in valuation of all taxable property in the city. The Londoner and Bi-Metallic cases apparently turned on whether the facts developed by the agencies were of a general concern or individually applicable.

These two cases were relied on by the Supreme Court in United States v. Florida East Coast Ry. Co.159 Referring to the line between informal rulemaking and adjudication, the Court said:

. . . While the line dividing them may not always be a bright one, the Londoner and Bi-Metallic decisions represent a recognized distinction in administrative law between proceedings for the purpose of promulgating policy-type rules or standards, on the one hand, and proceedings designed to adjudicate disputed facts in particular cases on the other.

In Florida East Coast Ry. two railroads brought an action in federal court to challenge the validity of rates160 established by the I.C.C. While the agency had followed all the procedures for informal rulemaking, the railroads argued that the rates could not validly be applied to them without an adjudicatory hearing because they were more disadvantaged by the rates than the other railroads.

The Supreme Court rejected their argument. Even though a small number of railroads (the complaining parties) were affected by the rates, unlike the Londoner case, the I.C.C. rates did not deal with "a small number of persons . . . 'exceptionally affected, in each case upon individual grounds.'"161

Thus whether an adjudication is required turns on whether the agency action deals with persons on individual grounds. The fact that a small number of persons is affected is irrelevant. For example, in Anaconda Co. v. Ruckelshaus,162 a proposed EPA rule provided limits on sulfur oxide emissions in Deer Lodge County, Montana, where Anaconda was the only significant source of sulfur oxide pollution. The court conceded that the rule would only apply to Anaconda,163 but held that the company had no right to an adjudicatory hearing.164 The issue, air pollution, is one of general policy even if only one company is affected. Also, since the rule was couched in general form, it would apply in the future to other potential polluters, as well as Anaconda. Thus the approach outlined in the

Londoner and Bi-Metallic cases, as reaffirmed and clarified in Florida East Coast Ry., should be followed to determine whether an agency must conduct an adjudication.¹⁶⁵ If an agency is properly engaged in informal rulemaking, the APA informal rulemaking procedures constitute the maximum procedural requirements the agency must follow.¹⁶⁶

Despite these Supreme Court decisions, some lower federal courts have taken an ad hoc hybrid approach to the question whether an adjudication is required. As one commentator stated:

The most constructive way to eliminate many of the inequities and inadequacies which appear from time to time in administrative proceedings is to pay less attention to theoretical, conceptual, and largely artificial lines between adjudication and rule making, and to devote more attention to the task of fashioning, out of the available arsenal of procedural techniques, hybrid modes of procedure most appropriate to the issues and circumstances of particular cases or classes of cases.¹⁶⁷

In Appalachian Power Co. v. Environmental Protection Agency¹⁶⁸ the Fourth Circuit summarized the hybrid approach:

Accordingly, if the resulting administrative action, whether regarded as rulemaking or otherwise, "is individual in impact and condemnatory in purpose" or "when the issue presented is one which possesses great substantive importance, or one which is unusually complex or difficult to resolve on the basis of pleadings and argument," a hearing preceding any final administrative action is appropriate. On the other hand, if a public hearing would appear unnecessary, either because of other available procedures or because the proceeding presents "only a question of law without any dispute on the facts" or "the ultimate decision will not be enhanced or assisted by the receipt of evidence," a prior hearing may be dispensed with.¹⁶⁹

The United States Court of Appeals for the District of Columbia has clearly embraced the hybrid approach:

Flexibility in fitting administrative procedures to particular functions is critically important in evaluating the APA and has been a dominant theme in a number of opinions by this court. No court, to our knowledge, has ever treated the explicit language of section 553 [i.e., informal rulemaking procedures] on the one hand

and sections 556 and 557 [i.e., adjudicatory procedures] on the other as expressing every type of procedure that might be called for in a particular situation.

The entire thrust of our opinion in City of Chicago v. FPC¹⁷⁰ was that artificial distinctions based on the language of the APA should be avoided in determining what procedure should be followed.¹⁷¹

And in Walter Holm Co. v. Hardin¹⁷² the court said:

This is not an area that may rightly be approached in terms of absolute rigidity of requirement. It is not the law that all orders must be preceded by oral hearings when a hearing is sought only on matters not involving material issues of fact. . . . And it is not the case that all administrative actions legitimately denominated regulations are ipso facto freed from any need for oral hearings. The kind of procedure required must take into account the kind of question involved.¹⁷³

The difficulty with the hybrid approach is that it ignores the APA definitions of an order and a rule. Those definitions must be dealt with. Moreover, the hybrid approach is no easier to apply than the approach approved of by the Supreme Court in the Florida East Coast Ry. case. Finally, and most important, the Supreme Court decisions are binding authority on lower federal courts. The lower courts that have adopted the hybrid approach may be committing legal error in ignoring the Supreme Court approach.

3. Rulemaking by Adjudication

The preceding discussion¹⁷⁴ focused on the problems of determining whether an agency is required to conduct an adjudication. The fact that an agency purports to engage in informal rulemaking does not determine whether it is required to follow the APA adjudicatory procedures.¹⁷⁵ If an agency is not required to follow the adjudicatory procedures, it is only required to follow the APA informal rulemaking procedures.¹⁷⁶ But an agency may, if it chooses, also adopt informal rules on a case-by-case basis through the process of adjudication.

In SEC v. Chenery Corp. (Chenery II)¹⁷⁷ the Supreme Court approved an SEC decision to establish new policy standards through individual adjudications, rather than through the process of informal rulemaking. The Court believed that informal rulemaking is not always ideal, since an agency cannot possibly foresee every problem and cover it by a rule. Agency rules,

by their very nature, are prospective only.¹⁷⁸ The Court recognized that whenever possible agency policy should be formulated by informal rulemaking.¹⁷⁹ However, the choice to use informal rulemaking or adjudications is within the agency's discretion.¹⁸⁰ According to the Court's view, agencies have sufficient expertise to make this choice. They can best determine whether the information necessary for a fair consideration of the substantive issues should be developed by the process of informal rulemaking or adjudication.¹⁸¹

The Chenery II rule allows agencies to formulate general policy retroactively in adjudications, rather than prospectively by rulemaking. That case did not decide, however, whether an adjudicatory order based on substantive determinations that also could have been incorporated into an informal rule can be validly enforced against non-parties, as well as parties to the adjudication. The issue is whether such an order is enforceable against non-parties when the agency has not satisfied the publication-comment requirements of informal rulemaking.

In N.L.R.B. v. Wyman-Gordon Co.,¹⁸² the Labor Board instituted a judicial action to enforce an adjudicatory order against Wyman-Gordon, a non-party to the prior adjudication.¹⁸³ The substance of the prior order required an employer to furnish to a requesting union a list of the names and addresses of the employer's employees so the union could use the list for election purposes. Wyman-Gordon argued that the Board's prior order was unenforceable against it. First, the order was unenforceable as an adjudicatory order because Wyman-Gordon was not a party to the prior adjudication. Second, the order was unenforceable as an informal rule because the APA procedures for informal rulemaking had not been followed by the agency. Specifically, notice was not published in the Federal Register.¹⁸⁴ Although selected non-party employers had been given actual notice of the prior adjudication, Wyman-Gordon was not included among them. The Board rejected Wyman-Gordon's arguments and issued an order against Wyman-Gordon. The substance of the order against Wyman-Gordon was identical to the prior order issued by the Board in the adjudication to which Wyman-Gordon was not a party.

In a 4-3-2 decision a majority of the Supreme Court held the Board's order against Wyman-Gordon was valid and enforceable. But because a majority of the Court did not join in the same opinion, there was no "opinion of the Court." A plurality of the justices stated that the order against Wyman-Gordon was valid since the agency decision that Wyman-Gordon must release the employee lists was made in the context of a proceeding in which Wyman-Gordon was a properly named party and all adjudicatory procedures were properly followed. These justices believed, however, that while the substance of the prior order was identical to the one issued against Wyman-Gordon, the prior order was not a valid rule since the notice-by-publication requirements of the APA for rulemaking had not been followed. The plurality opinion conceded, however, that

under the Chenery II rule the Board could have validly enforced the prior order against the party to that prior adjudication. (That was not done since the Board's prior order was prospective only.) In other words, the plurality believed that an agency may formulate policy on a case-by-case basis through adjudications instead of informal rulemaking.

A decision in an adjudication, however, can result only in the issuance of an order, not an informal rule. Thus a decision in an adjudication is enforceable only against a party to the adjudication. Adjudicative orders are not "rules" in the sense that they must, without more, be obeyed by the affected public.¹⁸⁵ The plurality opinion agreed, however, that in a subsequent adjudication an agency may, under the doctrine of stare decisis, follow the substantive policy announced in the prior adjudicatory decision.

The three concurring justices agreed with the plurality opinion that the order issued against Wyman-Gordon was valid. They surmised, however, that the plurality opinion was based on the ground that the prior order was invalid since it was, by its terms, prospective only.¹⁸⁶

They stated that an order must at least be retroactive in effect. They believed that if the prior order had been valid, it could also have been treated as a valid informal rule and enforced against Wyman-Gordon. They agreed with the plurality opinion, however, that the order against Wyman-Gordon was valid since the adjudication to which he was a party was conducted in accordance with all the required adjudicatory procedures.

The justices did agree on two points. First, an agency has the option to formulate general substantive agency policy either by the process of informal rulemaking or on a case-by-case basis through adjudications. The Chenery II rule was, in effect, reaffirmed. Second, a decision in a prior adjudication may be given stare decisis effect in a subsequent adjudication. The parties to the subsequent adjudication need not have been parties to the prior adjudication. Since a majority of the justices agreed on these two points, the points constitute rules of law.

A majority of justices, however, did not concur in the view that a prior order may be treated as an informal rule and enforced as such against a person who was not a party to the prior adjudication. This view therefore is not a rule of law. Had the Court held that the prior order sought to be enforced against Wyman-Gordon could have been given the effect of a valid informal rule, Wyman-Gordon could have avoided enforcement only by showing either that the adjudicatory procedures were not properly followed in the prior adjudication¹⁸⁷ or that, on the merits, the order-rule was arbitrary and

capricious.¹⁸⁸ But since the prior order was held not enforceable against Wyman-Gordon in the subsequent adjudication, the agency's decision to issue an order against Wyman-Gordon could have been set aside by the reviewing court on a showing that the order was not supported by substantial evidence.¹⁸⁹ That evidence must have been independently developed in adjudication to which Wyman-Gordon was a party. Generally, it is much more difficult to successfully attack a rule on grounds that it is arbitrary and capricious than to attack an order on ground it is not supported by substantial evidence.¹⁹⁰

C. PROCEDURAL REQUIREMENTS FOR FORMAL RULEMAKING AND ADJUDICATION

Formal rulemaking and adjudication are governed by detailed procedural provisions of the APA, set out in sections 554, 556, and 557.¹⁹¹ The adjudication procedures require a trial-type hearing, including the opportunity for parties to present oral¹⁹² or documentary evidence (including rebuttal), and to conduct cross-examination.¹⁹³ Section 556 is explicit in specifying the detailed requirements for the hearing. Section 556 spells out: (1) who shall preside over a hearing on the record; (2) what the presiding officer may do; (3) who has the burden of proof; (4) what rights the parties have; (5) that the transcript of testimony, exhibits, and all papers and requests filed in the proceeding shall be the exclusive record for the decision.¹⁹⁴ The agency should not permit ex parte communications to it in conducting proceedings governed by the adjudication procedures of the APA.¹⁹⁵

D. INFORMAL RULEMAKING PROCEDURAL REQUIREMENTS UNDER THE APA AND NFMA

1. Procedures for Informal Rulemaking Under Section 553

The procedural requirements for informal rulemaking¹⁹⁶ are covered by section 553 of the APA.¹⁹⁷ Basically, all that is required of the agency is to publish a general notice of proposed rulemaking in the Federal Register¹⁹⁸ and to give any interested persons an opportunity to participate in the rulemaking through submission of written arguments, views, or data.¹⁹⁹ This input becomes part of the record,²⁰⁰ which must reflect all of the representations made to the agency.²⁰¹ If secret, i.e., ex parte communications are made to the agency, the agency has a duty to include the substance of those communications in the agency record.²⁰² And if the agency considers the information contained in ex parte communications relevant, the agency must fully disclose the communications to the public to permit adversarial comment.²⁰³ After consideration of any relevant input, an adopted rule must be accompanied by a concise general statement of its basis and purpose.²⁰⁴ Finally, the effective date of a rule may not be less than 30 days after it is published.²⁰⁵

Significantly, the agency may, but need not conduct an oral hearing.²⁰⁶ In Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.,²⁰⁷ the Supreme Court held that section 553 contains the maximum procedural requirements the agency must follow in making informal rules. The Court stated, however, that a "totally unjustified departure from well settled agency procedure of long standing might require judicial correction."²⁰⁸ The Vermont Yankee decision made clear that, in performing its informal rulemaking function, an agency is not required in the first instance to follow more than the minimal procedures of section 553--none of which require a hearing or compilation of a trial-type record. The Supreme Court stated:

The court below uncritically assumed that additional procedures will automatically result in a more adequate record because it will give interested parties more of an opportunity to participate and contribute to the proceedings. But informal rulemaking need not be based solely on the transcript of a hearing held before an agency. Indeed, the agency need not even hold a formal hearing. See 5 U.S.C. § 553(c). Thus, the adequacy of the "record" in this type of proceeding is not correlated directly to the type of procedural devices employed, but rather turns on whether the agency has followed the statutory mandate of the Administrative Procedure Act or other relevant statutes. If the agency is compelled to support the rule which it ultimately adopts with the type of record produced only after a full adjudicatory hearing, it simply will have no choice but to conduct a full adjudicatory [hearing] prior to promulgating every rule. In sum, this sort of unwarranted judicial examination of perceived procedural shortcomings of a rulemaking proceeding can do nothing but seriously interfere with that process prescribed by Congress.²⁰⁹

Finally, even where a hearing is conducted, it may be informal. For example, no right to cross-examine exists.²¹⁰

2. Exceptions to Informal Rulemaking Requirements

Section 553 contains several express exceptions to its application. Section 553(a) provides:

This section applies, according to the provisions thereof, except to the extent that there is involved--

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

The exception of matters relating to public property could encompass many Forest Service rules. Forest Service lands have been held to fall squarely within the public property exception. In Duke City Lumber Co. v. Butz²¹¹ the plaintiffs, twelve forest product manufacturing companies, had attacked the validity of changes in a small business timber set-aside program as established by a Memorandum of Understanding between the Small Business Administration and the USDA. The program was implemented by the Forest Service. The court cited with approval the definition of "public property" set out in the Attorney General's Manual on the APA, which provides:

Public Property. This embraces rules issued by any agency with respect to real or personal property owned by the United States or by any Agency of the United States. Thus, the making of rules relating to the public domain, i.e., the sale or lease of public lands or of mineral, timber or grazing rights in such lands, is exempt from the requirements of Section 4 [5 U.S.C. § 533].²¹²

Similarly, lands subject to the Bureau of Reclamation's management have also been held to be within the exception.²¹³

The public property exception is not limited to rules relating to day-to-day managerial functions of government property, but also applies to rules which address broad public policy questions concerning the use of government property.²¹⁴

The "military or foreign affairs" exceptions of subdivision (a)(1) are not likely to apply to the Forest Service's functions.

The applicability of "agency management or personnel" exceptions turns on whether the matter covered by the rule is internal and has no substantial effect on persons outside the agency. For example, a Civil Service Commission regulation dealing which exempted federal employees from the Hatch Act prohibitions regarding their participation in certain District of Columbia election campaigns, did not fall within the exemption, since outside persons were substantially affected by the regulation.²¹⁵

The "loans, grants, benefits" exceptions include research grants, subsidies, and assistance programs administered by the Forest Service. For example, rules relating to most of the matters covered by the Cooperative Forestry Assistance Act of 1978²¹⁶ would be exempted from the section 553 requirements under this exception.

The "loans" exception has been construed broadly. A North Carolina federal court held that a USDA rule requiring auction warehouse floor identification of discount varieties of tobacco

fell within the loan exception. The court reasoned that the rule related to loans since a failure to identify discount varieties of tobacco would depress the tobacco market, which, in turn, would result in an increase of government loans on tobacco crops.

The "contract" exception would apply, of course, to any rules relating to contracts to which the Forest Service is a party. Overlap among the exceptions of section 553(a) is possible. For example, rules relating to contracts providing for research grants to study certain aspects of Forest Service lands could fall within the contracts, grants, and public property exceptions.

Even if a rule is not covered by a section 553(a) exception, the rule may be exempted by section 553(b) from the procedural requirements of section 553. Section 553(b) provides:

Except where notice or hearing is required by statute, this subsection does not apply--

(A) to interpretive rules, general statements of policy, or rules of agency organization procedure, or practice,^[218]

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

The APA informal rulemaking requirements do not apply to informal rules where the rules are: "interpretive, . . . general statements of policy, or rules of agency organization, procedure, or practice."²¹⁹ For example, this statutory exception was held to apply to matters of internal agency management,²²⁰ an FPC announcement setting forth curtailment priorities in the reduction of delivery to natural gas users,²²¹ a rule which, in the opinion of the administrative officer, clarifies or explains existing laws or regulations rather than modifies or adopts a new regulation,²²² and ICC rules of procedure relating to disposition of applications by railroads for the abandonment of lines.²²³

Similarly, the APA informal rulemaking procedures do not apply "when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."²²⁴ For example, where a 30-day advance notice of crude oil price increases would have adversely affected sales, the Cost of Living Council demonstrated "good cause" for deviation from the 30-day requirement of section 553(d).²²⁵

Section 443(d) provides other exceptions:

The required publication of service of a substantive rule shall be made not less than 30 days before its effective date, except--

- (1) a substantive rule which grants or recognizes an exemption or relieves a restriction;
- (2) interpretive rules and statements of policy; or
- (3) as otherwise provided by the agency for good cause found and published with the rule.

Section 553(d) provides that certain "substantive" rules, which are otherwise subject to the procedures of informal rulemaking, are excepted from the requirement that the effective date of an informal rule be at least 30 days after it is published or served. The exceptions are limited altogether from informal rulemaking procedures. Sections 553(d)(1) and (2) except the 30-day requirement from a substantive rule which grants or recognizes an exemption, relieves a restriction, is interpretive, or is a statement of policy. The "statement of policy" exception is actually surplusage since section 553(b)(A) excepts such rules from all informal rulemaking procedures.²²⁶ The other exceptions included in sections 553(d)(1) and (2) refer to rules which, by their nature, benefit the persons covered by the rules, rather than create burdens or duties. Thus these persons are presumably not prejudiced if these rules are effective immediately (or less than 30 days) after publication or service.

Section 553(d)(3) is similar to the "good cause" exception of section 553(b). Subdivision (d)(3) is not surplusage, however, since circumstances may arise where good cause exists to warrant deviation from the 30-day requirement regarding effectiveness of a rule, but where the circumstances do not justify an exception from the informal rulemaking procedures entirely.²²⁷

3. Forest Service Waiver of the Section 553(a) Exceptions

Some agencies, realizing that it is often desirable to consider public participation in their rulemaking functions, have voluntarily complied with the informal rulemaking procedures of the APA, even though the agencies are not required to do so.²²⁸ On July 24, 1971, the USDA promulgated a regulation making the procedural requirements of section 553 applicable to all of its rulemaking relating to public property, loans, grants, benefits, or contracts.²²⁹ That regulation was validly issued and therefore has the force and effect of law.²³⁰ Other agencies such as the HEW²³¹ and the Department of Labor²³² have issued similar regulations. These regulations constitute a waiver of the statutory exemption.²³³

4. Exceptions Limited to Section 553 Actions

The exceptions set out in section 553 of the APA, when applicable, apply only to informal rulemaking under force of section 553 of the APA itself; they do not affect any otherwise applicable provisions or requirements of the APA or any other statute.²³⁴ Section 559 of the APA provides that the APA does "... not limit or repeal additional requirements imposed by statute or otherwise recognized by law." For example, even where an agency is excepted from the notice and public comment requirements of section 553, the Freedom of Information Act requires that the agency publish all substantive and procedural rules, except those relating "solely to the internal personnel rules and practices of an agency."²³⁵

5. The Effect of NFMA on Rulemaking Requirements for the Forest Service

As previously discussed, the Forest Service must comply with the informal rulemaking procedures of the APA²³⁶ and applicable provisions of other statutes, such as the Freedom of Information Act.²³⁷ NFMA imposed additional rulemaking requirements. Section 1612(a) of NFMA states:

In exercising his authorities under this Act and other laws applicable to the Forest Service, the Secretary by regulation shall establish procedures, including public hearings where appropriate, to give the Federal, State, and local governments and the public adequate notice and an opportunity to comment upon the formulation of standards, criteria, and guidelines applicable to Forest Service programs.²³⁸

Section 1612(a) requires the Forest Service to establish procedures, i.e., informal procedural rules,²³⁹ to give the public and federal, state, and local governments an opportunity to comment upon the formulation of "standards, criteria, and guidelines" applicable to any Forest Service program. This requirement applies to all Forest Service programs established under any law, not just programs established under NFMA. Since the informal rulemaking requirements of the APA do not apply to procedural rules,²⁴⁰ those requirements need not be followed in establishing the procedures required by section 1612(a) of NFMA. However, the Freedom of Information Act, 5 U.S.C. § 552 (1976), requires that all federal agencies publish in the Federal Register all procedural rules, except those related solely to matters of internal personnel and practices.²⁴¹

The notice and comment requirements of section 1612(a) of NFMA apply to the formulation of standards, criteria, and guidelines applicable to all Forest Service programs. The terms "standards," "criteria," and "guidelines" all come within the definition of a "rule."²⁴² Such

rules are subject to the informal rulemaking procedures of the APA,²⁴³ unless they conflict with section 1612(a), in which case section 1612(a) controls.²⁴⁴ The notice and comment requirements of section 1612(a) are similar to requirements for informal rulemaking under the APA.²⁴⁵

Some differences do exist, however, between the requirements of the APA and section 1612(a). The APA requires that notice be made in the Federal Register, whereas section 1612(a) does not specify the details of notice. To avoid any possible successful attacks on these section 1612(a) procedures in future litigation, the Forest Service should adopt a method of notice that is at least as effective as publication in the Federal Register. In fact, publication of notice in the Federal Register is advisable since it is, administratively, the most convenient method available for giving notice. While section 1612(a) does not require a minimum time between the date of publication and date of effectiveness of a rule, the 30-day minimum time period required by the APA²⁴⁶ does not conflict with any of the provisions of section 1612(a), and therefore the APA 30-day time period governs.

Finally, neither the informal rulemaking procedures of the APA nor section 1612(a) require a hearing. Under section 1612(a), unlike the APA,²⁴⁷ the Forest Service has a duty to determine whether a hearing is appropriate. Again, this requirement of section 1612(a) governs over the APA.²⁴⁸ Whenever the Forest Service intends to dispense with a hearing prior to adopting a particular rule, it should first determine that a hearing is inappropriate. NFMA does require a hearing, however, for developing land management plans under section 1604.²⁴⁹ Whether a hearing is required in developing Assessment Reports under section 1601 is discussed below.²⁵⁰

The "standards, criteria and guidelines" referred to in section 1612(a) may also include rules which, by the terms of the APA, are excepted entirely from the informal rulemaking requirements of the APA.²⁵¹ For example, if a section 1612(a) rule is interpretive, a general statement of policy, or relates to Forest Service organization, procedure, practice, management, or personnel, the rule is excepted from the APA informal rulemaking requirements, such as the 30-day publication requirement.²⁵² Notice and opportunity for comment would be required, however, under section 1612(a).

In sum, section 1612(a) requires the Forest Service to adopt informal procedural rules which provide for adequate notice to and opportunity for the public and governments to comment upon the formulation of rules which express standards, criteria, and guidelines applicable to Forest Service programs. These procedural rules are not subject to notice and comment requirements but may have to be published under the Freedom of Information Act. The rules subject to the section 1612(a) notice and comment provisions must comply with the APA requirement that a rule may not be effective until

at least 30 days after publication, unless the rule is interpretive, a general statement of policy, or relates to agency procedures, practice, management, or personnel.

Section 1613 supplements section 1612(a) and requires the Secretary to prescribe informal rules²⁵³ as he determines necessary and desirable to carry out the provisions of NFMA. Section 1613, in effect, requires the Secretary to adopt rules with respect to NFMA. Except for rules for development of land management plans,²⁵⁴ the Secretary has broad discretion as to what rules should be adopted to carry out the provisions of NFMA. Any rule adopted under section 1613 that expresses standards, criteria, and guidelines applicable to NFMA must comply with the notice and comment requirements of section 1612(a).²⁵⁵ Rules adopted under section 1613 apply, for example, to assessment reports under section 1601;²⁵⁶ the renewable resource program of section 1602; compiling resource inventories under section 1603; the process required by section 1604(l)(1) for estimating long-term costs and benefits to support the program evaluation requirements of NFMA;²⁵⁷ standards required by section 1604(m) to ensure that, prior to harvest, stands of trees throughout the NFS shall generally have reached the culmination of mean annual increment of growth;²⁵⁸ developing road system plans under section 1608; and establishing allowable sale quantities of timber under the requirements of section 1611.

Section 1601(c) provides:

In developing the reports required under subsection (b) of this section, the Secretary shall provide opportunity for public involvement and shall consult with other interested governmental departments and agencies.

Section 1601(b) of NFMA requires the Forest Service to develop certain "assessment reports." Section 1601(c) requires that, in developing these reports, "the Secretary shall provide [an] opportunity for public involvement and shall consult with other interested governmental departments and agencies." A determination must be made whether section 1601(c) requires more than the notice and comment requirements of section 1612(a) of NFMA or the informal rulemaking procedures of the APA.²⁵⁹ Section 1601(c) should be construed as permitting, but not requiring a hearing. The language of section 1601(c) requiring an opportunity for public involvement is substantially the same as the language of the corresponding requirements of section 1612(a) of NFMA and the informal rulemaking procedures of the APA.²⁶⁰ Since the Supreme Court has held that the procedures for informal rulemaking under the APA do not require a hearing,²⁶¹ section 1601(c) should be construed as not requiring a hearing in developing assessment reports.

Section 1604(d) provides:

The Secretary shall provide for public participation in the development, review, and revision of land management plans or revisions available to the public at convenient locations in the vicinity of the affected unit for a period of at least three months before final adoption during which period the Secretary shall publicize and hold public meetings or comparable processes at locations that foster public participation in the review of such plans or revisions.²⁶²

A determination must be made whether section 1604(d) requires hearings to be held in developing land management plans, and, if so, what types of hearings. The term "public meeting," as ordinarily understood, certainly contemplates affording an opportunity for oral presentation of public views. And a public meeting is normally one which the general public is free to attend, as opposed to one at which attendance is restricted to certain persons. The term "meeting," as contrasted to "hearing," suggests that Congress intended that section 1601(c) proceedings be informal. At the least, the term "meeting" suggests that Congress did not intend that the Forest Service be required to conduct a trial-type hearing.²⁶³ Thus section 1604(d) requires that public, oral hearings be held for developing land management plans, but the hearings may be conducted informally.

Section 1604(g) provides:

. . . the Secretary shall in accordance with the procedures set forth in section 553 of title 5, United States Code, promulgate regulations . . . that set out the process for development and revisions of the land management plans, and guidelines and standards prescribed by this subsection

Section 1604(g) then goes on to specify the minimum guidelines and standards that these informal rules²⁶⁴ must contain.

Section 1604(g) contains a confusing requirement that the procedures of section 553 of the APA govern the promulgation of Forest Service rules for developing land management plans. First, no reference to rulemaking procedures was needed at all since section 1612(a) of NFMA requires that the Forest Service adopt rulemaking procedures similar to those contained in section 553 of the APA.²⁶⁵ Second, if the Forest Service adopts rulemaking procedures for land management plans under section 1612(a) which conflict with or require less than section 553, the question arises whether the procedures can be validly applied to making rules for developing land management plans. Section 1604(g) is specifically directed to land management plans under NFMA, and section 1612(a) applies to proce-

dural rulemaking for all Forest Service programs, generally, i.e., not just NFMA. Under well settled rules of statutory construction the specific language of a statute should control over the general language of a statute. Thus the requirements of section 1604(g) should govern over those of section 1612(a).

The Forest Service should follow the procedures of section 553 of the APA in promulgating regulations for the development of land management plans. The Forest Service needs only to follow the minimum procedural requirements contained in section 553 of the APA.²⁶⁶ The Forest Service may, if it chooses, adopt additional procedure requirements under section 1612(a).²⁶⁷

Section 1604(g) ostensibly refers to the notice and comment provisions of section 553, but not to its built-in exceptions; otherwise, apparent anomalies result. For example, section 1604(g)(1) requires that the Forest Service adopt procedural rules to insure that land management plans are developed in accordance with the mandates of the National Environmental Policy Act.²⁶⁸ The APA, however, excepts from its notice and comment requirements rules which relate to agency procedure.²⁶⁹ The notice and comment requirements of section 553 are also excepted by its term where the agency for "good cause" determines that these requirements would be "impracticable, unnecessary, or contrary to the public interest."²⁷⁰ Surely, the requirement of public participation in the development of land management plans, as required in section 1604(g), would be emasculated if the exceptions in section 553 were held to apply.

In sum, the notice and comment requirements, but not the built-in exceptions, of section 553 of the APA apply for adopting rules for developing land management plans. Additional rulemaking procedures may be adopted by the Forest Service under section 1612(a). In any event, the rules for developing land management plans must include the guidelines and standards prescribed by sections 1604(g)(1) and (2).

E. JUDICIAL REVIEW OF AGENCY ACTION

A court will not review agency action on its own initiative. A person complaining of a particular agency action must first request²⁷¹ the court to review the agency action. When a person does seek judicial review of agency action, two separate issues usually arise. First, a determination must be made whether the court may review the agency action at all. Judicial review is completely foreclosed, for example, where subject matter jurisdiction is lacking,²⁷² the plaintiff lacks standing,²⁷³ sovereign immunity applies,²⁷⁴ or a federal statute expressly prohibits judicial review.²⁷⁵ Second, if the agency action is reviewable, a determination must then be made by the court regarding the proper scope or standard of judicial review. A standard

of judicial review dictates (1) the extent to which, if any, the court may substitute its judgment for that of the agency,²⁷⁶ and (2) what the court must or may consider in conducting the review (i.e., what constitutes the "record" for purposes of judicial review).²⁷⁷

As discussed below, the applicable standard of judicial review depends on the particular type of agency action sought to be reviewed. For example, judicial review of the merits of an informal rule require a different standard than judicial review of the merits of a formal rule or the decision in an adjudication.²⁷⁸ Also, the standard of judicial review depends on whether the plaintiff seeks review of the procedures followed by the agency, as opposed to the merits of an agency rule or decision.²⁷⁹

Section 706 of the APA provides:

Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall -

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be -

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.²⁸⁰

1. Reviewability of Discretionary Agency Action

Before the various standards of review are discussed, consideration will be given to the question whether discretionary agency action is reviewable at all. Section 701(a)(2) of the APA provides that the APA sections on judicial review do not apply "to the extent that . . . agency action is committed to agency discretion by law."²⁸¹ Congress did not intend by this provision to foreclose entirely judicial review of all discretionary agency action.²⁸² In fact, section 706(2)(A) provides that a court may set aside agency action found to be "an abuse of discretion." Obviously, a court must review the action to determine whether it amounted to an abuse of discretion.²⁸³

The Supreme Court has consistently held that judicial review of agency action is available, unless a "showing of 'clear and convincing' evidence" is made that Congress intended to prohibit judicial review.²⁸⁴ In Overton Park,²⁸⁵ the Supreme Court held that judicial review of discretionary agency action is foreclosed by the APA only "in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.'"²⁸⁶ The Court also said that these APA provisions²⁸⁷ constitute a "very narrow exception."²⁸⁸

The line between the "no law to apply ergo not reviewable" rule of Overton Park and "some law to apply ergo reviewable under an abuse of discretion standard," however, is difficult to discern. For example, in Ness Investment Corp. v. USDA Forest Service,²⁸⁹ the Ninth Circuit held that the Forest Supervisor's decision that an applicant was unqualified to receive a special use permit for construction of a resort was committed to agency discretion by law. Hence the court had no jurisdiction to review it. The court placed heavy reliance on the statute,²⁹⁰ which authorizes, but does not require, the Secretary to issue permits "under such regulation as he may make and upon such terms and conditions as he may deem proper," subject to the conditions that the general public be not precluded from full enjoyment of the national forests. The complaining applicant and the court could find no statutory restrictions or definitions prescribing precise qualifications for permittees. The court noted:

... Agency expertise and knowledge [are] deeply involved in the decision to award a special use permit. What is

needed, and where, are questions best answered by the forest service, which is involved on a daily basis with the management and use of the national forests. The federal courts have no such expertise, nor, in this case, do the courts have any standards by which acceptance or rejection of a particular applicant could be tested.²⁹¹

The court did find, however, that there was "some law to apply" to test applicant's allegations that, in denying its application for a use permit, the Forest Service failed to comply with a certain decision of the board of forest appeals, pertinent regulations, and provisions of the Forest Service manual.²⁹² And in Perkins v. Bergland²⁹³ the federal district court held that a decision by the Forest Service to reduce the authorized maximum number of cattle under a grazing permit was unreviewable under section 701(a)(2). The court found that there was no law to serve as a standard against which to measure the lawfulness of the Forest Service's action. The court explained:

In considering whether administrative action is "committed to agency discretion by law" within the meaning of the APA, the test "is not whether a statute viewed in the abstract lacks law to be applied, but rather, whether 'in a given case' there is no law to be applied." Strickland v. Morton, 9 Cir., 1975, 519 F.2d 467, 470 (emphasis in original). Thus the existence of some law generally applicable to the subject matter in question will not necessarily remove administrative action from the "committed to agency discretion" rubric. There is "law to apply," only if a specific statute limits the agency's discretion to act in the manner which is challenged.²⁹⁴

Even where the discretionary agency action is otherwise reviewable, the plaintiff must allege specific allegations of an abuse of discretion. General allegations of an abuse of discretion add nothing to the complaint, and therefore should be ignored by the court.²⁹⁵

2. Standards of Judicial Review

Once a court determines that particular agency action is reviewable, the court should determine to what extent, if any, it may substitute its judgment for that of the agency. In other words, the scope or standard of review defines the limits of the reviewing court's inquiry into the validity of the agency action. The APA sets out rather specific standards of review, depending, among other things, on the type of agency proceeding conducted (e.g., informal rulemaking, formal rulemaking, adjudication) and the particular issue (e.g., procedural, merits) involved.

Section 706 provides that the reviewing court shall decide questions of law only "to the extent

necessary to decision."²⁹⁶ It is a fundamental judge-made rule of law that a court need not--and indeed, technically, should not--decide questions not necessary to the decision. Such activity not only is wasteful of the court's time and resources, but also constitutes dicta. This rule has been applied by the Supreme Court to agency action.

In Immigration and Naturalization Service v. Bagamasbad²⁹⁷ the agency was authorized by statute to certify an alien's eligibility for admission into the United States as a permanent resident only if certain criteria were established. The Supreme Court held that the agency did not err in failing to make any findings with respect to the criteria, because her application was properly denied on ground she made a serious misrepresentation to the U.S. Counsel, who had previously issued her a tourist visa. The Court reasoned that agencies, as well as courts, are not required, absent an express statutory requirement, to make findings on issues where the decision is unnecessary to the results they reach.²⁹⁸ Section 706 has, in effect, adopted this rule of law.

Thus a court will review particular allegations of unlawful agency actions only "to the extent necessary," i.e., only where such a review could possibly affect the result reached by the court in reviewing the action.

Under section 706:

. . . the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of agency action.²⁹⁹ The reviewing court shall . . . hold unlawful . . . agency action found . . . not in accordance with law;³⁰⁰ [or] . . . contrary to constitutional right, power, privilege, or immunity.³⁰¹

These provisions state that the court shall decide all relevant questions of law, whether statutory or constitutional law. They have also been construed to allow the court to interpret the meaning or applicability of the agency's own rules and regulations.³⁰² The court is free to determine pure questions of law *de novo*, i.e., without having to consider or to defer at all to the agency's view of determination.³⁰³

The courts, however, frequently avoid *de novo* review by deferring to the agency's familiarity and expertise in a certain area.³⁰⁴ In so doing a court may characterize an issue as a mixed question of fact and law. Rather than struggle with two standards of review when fact and law issues are intertwined, the court may accept the agency's view where it has "warrant in the record" and a "reasonable basis in law."³⁰⁵

The courts also have often deferred to an agency's view in reviewing an agency's guidelines interpreting a statute. The court is not bound by the agency's interpretation of the Act--or even of its own regulations, for that matter--but normally accords the agency great deference.³⁰⁶ For example, in *West v. USDA*³⁰⁷ the Secretary had the responsibility for formulating and administering the Food Stamp Act. He determined that household size and income would affect the price of food stamps. The court deferred to the Secretary's judgment where the legal question involved the meaning of a statute continually applied and interpreted by the Executive Branch.

Under section 706, "[t]he reviewing court shall . . . compel agency action unlawfully withheld."³⁰⁸ This provision requires the court to issue a mandatory injunction on ground that agency action has been unlawfully withheld. This particular relief under section 706 has been held to be the same as mandamus.³⁰⁹ The circumstances under which mandamus relief is available are discussed elsewhere.³¹⁰

Moreover, section 706 provides: "[t]he reviewing court shall . . . compel agency action . . . unreasonably delayed."³¹¹ If agency inaction has the same effect as a denial by the agency of requested relief, an agency cannot preclude judicial review by casting its decision in the form of inaction rather than in the form of an order denying relief.³¹² And where an agency has delayed in acting on a person's application or complaint, compulsion of the inaction may be ordered under this provision.³¹³ But a court order should not issue without a showing that the delay was unreasonable and caused substantial prejudice to the complaining party.³¹⁴

Section 706 also deals with arbitrary agency action. "The reviewing court shall . . . hold unlawful and set aside agency action . . . found to be . . . arbitrary, capricious, or an abuse of discretion."³¹⁵ The problem of reviewability of discretionary action has previously been discussed.³¹⁶ In the following discussion, it is assumed that the action is reviewable, and the discussion will focus on the standard of review.

The courts have accepted the following approaches in determining whether a statute has committed a particular decision to agency discretion: (1) where the statute uses permissive, rather than mandatory language;³¹⁷ (2) where the statutory standards are expressed in broad, general terms rather than specific guidelines, so that the very construction of the statute is an exercise in discretion;³¹⁸ or (3) where the question requires the exercise of expert judgment within the special competence of the agency, rather than an essentially legal determination.³¹⁹ For example, under the Urban Mass Transportation Act, the Department of Transportation may award grants to assist state and local public bodies and agencies in financing the purchase of mass transit equipment "on such terms and conditions as the Secretary may pre-

scribe."³²⁰ The issuance of these regulations involves discretionary action on the part of the Secretary.³²¹

Section 706(2)(A) refers to agency action which is "arbitrary, capricious, or an abuse of discretion."³²² The terms "arbitrary," "capricious," and "abuse of discretion" are not mutually exclusive. In fact, if an agency acts arbitrarily or capriciously in exercising a discretionary function, the action is an abuse of discretion. Thus arbitrary and capricious discretionary actions are examples of an abuse of discretion.³²³ In *Overton Park*³²⁴ the Court rather cryptically held: "To make this finding the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment."³²⁵

While the scope of discretionary action is narrow³²⁶ and the agency's decision is entitled to a presumption of regularity,³²⁷ the court is required to engage in a "substantial inquiry,"³²⁸ a "thorough, probing, in-depth review."³²⁹ However, the court may not substitute its judgment for that of the agency.³³⁰ But where an agency finding is based upon no reliable evidence whatever, a "clear error of judgment" has occurred, and the finding should be set aside as an abuse of discretion.³³¹

The arbitrary, capricious, abuse of discretion standard of review applies to review of the merits of an informal rule and the agency's statement of the basis and purpose of an adopted rule.³³² The substantial evidence test³³³ is wholly inappropriate.³³⁴ An informal rule is not arbitrary and capricious provided it is not unreasonable and has some support in the record.³³⁵ In other words, the reviewing court must defer to the agency's judgment if the agency has a rational basis for its decision.³³⁶ In *United States v. Allegheny-Ludlum Steel Corp.*,³³⁷ the Supreme Court succinctly summarized the arbitrary and capricious standard of review as follows:

We do not weigh the evidence introduced before the Commission; we do not inquire into the wisdom of the regulations that the Commission promulgates, and we inquire into the soundness of the reasoning by which the Commission reaches its conclusion only to ascertain that the latter are rationally supported.

Section 706(2)(C) also deals with agency action that is beyond statutory authority. It states that, "[t]he reviewing court shall . . . hold unlawful . . . agency action . . . found to be . . . in excess of statutory jurisdiction, authority, or limitations, or short of statutory right."

The issue whether an agency acted outside of its statutory authority or in excess of its statutory limitations can be determined *de novo*

by the court, just as any other pure issue of law.³³⁹ For this reason, this issue, if raised, ought to be resolved before considering whether the agency acted arbitrarily or capriciously or otherwise abused its discretion.³⁴⁰

Section 706(2)(D) authorizes review for agency procedural errors. "The reviewing court shall . . . hold unlawful . . . agency action . . . found to be . . . without observance of procedure required by law."³⁴¹

A discussion of the procedures required for informal and formal rulemaking and adjudication is found elsewhere.³⁴² Where an agency fails to comply with required procedures and the failure causes substantial prejudice to the complaining party, the agency action will be set aside. Actually, any error not relating to the merits is a procedural error. For example, when an agency exceeds its statutory authority³⁴³ or makes findings unsupported by substantial evidence in formal rulemaking or adjudication proceedings,³⁴⁴ the agency has committed procedural error.

Under section 706(2)(E) agency findings in formal rulemaking and adjudications must be supported by substantial evidence. Section 706(2)(E) provides:

The reviewing court shall . . . set aside findings, and conclusions found to be . . . unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute.³⁴⁵

Section 706(2)(E), in effect, provides that agency findings and conclusions must be supported by substantial evidence on the agency record as a whole.³⁴⁶ The substantial evidence test applies only to review of findings and conclusions in formal rulemaking and adjudications.³⁴⁷ The test does not apply to judicial review of informal rulemaking.³⁴⁸

In applying the substantial evidence test, the court may not substitute its judgment for that of the agency.³⁴⁹ In other words, the court may not set aside an agency finding or conclusion merely because the court might have come to a different conclusion or result than that of the agency. The substantial evidence test has been expressed by the courts in various ways. No consensus, much less unanimous opinion exists as to a single definition of what constitutes "substantial evidence."

According to the Second Circuit, findings and conclusions must be sustained by the court if the evidence on which the agency made its decision could reasonably convince an unprejudiced mind of the truth of the facts to which it is directed.³⁵⁰ According to the Fifth and Sixth Circuits the evidence in support of the findings and conclusions must be enough to warrant denial of a motion for a directed verdict in a civil case tried to a jury.³⁵¹ The Fourth and Eighth Circuits have held

that substantial evidence consists of more than a mere scintilla of evidence, but may be somewhat less than a preponderance of the evidence.³⁵² Although worded differently, these various tests adopted by the courts contain essentially the same requirements.

Factual issues are subject to de novo review under limited circumstances. Section 706(2)(F) provides:

The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.³⁵³

That section allows a trial court to set aside agency action unwarranted by the facts provided that the facts are subject to a de novo determination by the reviewing court. The statute does not say, however, what facts are subject to de novo determination by the court.

In Overton Park³⁵⁴ the Court said that de novo review to determine whether agency action is unwarranted by the facts is appropriate only where there were (1) inadequate fact finding procedures in an adjudicatory hearing, or (2) issues raised in a proceeding to enforce non-adjudicatory agency action, which were not before the agency.³⁵⁵ For example, in Bray v. United States³⁵⁶ the Air Force had ordered the involuntary discharge of an airman for being unfit on grounds of homosexuality. The reviewing court held that where the Secretary failed to comply with applicable regulations and committed other substantial procedural errors, the fact finding procedures were inadequate, and therefore a trial de novo was appropriate. In Secretary of Labor v. Faurio³⁵⁷ the court held that agency fact finding procedures were inadequate if the plaintiff - alien visa applicant had no opportunity to respond before the agency to information provided by the State Employment Service. The court also said that the court has the option of remanding the case to the agency or conducting a de novo court hearing.³⁵⁸

The Supreme Court in Overton Park said that de novo judicial review is also appropriate where issues which were not before the agency are raised in a proceeding to enforce nonadjudicatory agency action. The lower federal courts have construed this situation as limited to proceedings brought by an agency to enforce an informal rule. De novo review does not apply to a judicial proceeding brought by a person challenging the validity of an informal rule or regulation.³⁵⁹

Judicial review of informal rulemaking is slightly more difficult. Normally, statutory rulemaking authority for federal agencies is expressed in broad permissive language and is not subject to the adjudication procedures of the

APA.³⁶⁰ Such rules are "informal" rules³⁶¹ and can be attacked on the merits only by showing the rule is arbitrary, capricious, or an abuse of discretion.³⁶² The other grounds discussed above³⁶³ may also provide a basis for judicial attack of agency action. The most common grounds (in addition to an abuse of discretion ground) raised in litigation attacking informal rules are that the agency exceeded or violated its statutory authority³⁶⁴ or failed to follow required procedures.³⁶⁵

Similarly, "formal" rules³⁶⁶ and adjudications³⁶⁷ can be attacked on the merits by showing that the rule or adjudication is arbitrary, capricious, or an abuse of discretion.³⁶⁸ Such a showing, however, is difficult to make.³⁶⁹ Unlike an attack on informal rulemaking,³⁷⁰ a formal rule or adjudication may be set aside if the agency action, findings, or conclusions are not supported by substantial evidence contained in the administrative record.³⁷¹ Moreover, the plaintiff's chances of revealing a procedural error³⁷² committed by the agency are greater than when informal rulemaking is involved, since the procedures required are to be followed in formal rulemaking and adjudication are much more complex.³⁷³

The APA also addresses the problem of the agency record for review. Section 706 provides that "the court shall review the whole record or those parts cited by a party."³⁷⁴ And this requirement of section 706 applies to review of any agency action under the APA. The procedures governing informal rulemaking, however, do not make any express reference to an administrative record requirement. At a minimum, though, the record will consist of any written arguments, data, or views submitted by interested persons;³⁷⁵ the record will also consist of the agency's statement of the basis and purpose of any adopted rules.³⁷⁶ The APA does not require formal findings to support an informal rule.³⁷⁷ Nor does the substantial evidence rule³⁷⁸ apply to informal rulemaking.

Because the APA does not have strict, express requirements regarding the administrative record in informal rulemaking, agencies have often encountered judicial nullification of their informal rules on ground of an inadequate record. Aside from the few issues subject to *de novo* judicial determination,³⁷⁹ judicial review of informal rulemaking is obviously frustrated--if not made impossible--where no agency record exists to explain the reasons or bases for adoption of a particular informal rule. As one court described the problem:

Without a record, judicial review of the Secretary's action can be little more than a formality. . . . Furthermore, it is hard to see how, without the aid of any record the [agency] could satisfactorily make the determination required by the statute. The absence of a record, in other words, simultaneously obfuscates

the process of review and signals sharply the need for careful scrutiny.³⁸⁰

Thus the grounds upon which the agency acted in adopting an informal rule must be clearly disclosed in and sustained by the record.³⁸¹ The failure to make explicit findings does not, in itself, invalidate the agency action. But the complete non-existence of any contemporaneous administrative record can result in judicial nullification of the agency action.³⁸²

The integrity of the informal rulemaking process should be judged by what took place in the administrative proceeding as reflected in the administrative record. *Post hoc* rationalizations of counsel or the agency members should normally be avoided.³⁸³ In some cases, however, court examination of the agency decisionmakers may be the only way to conduct an effective judicial review of informal rulemaking.³⁸⁴ In such cases, the court may require the administrative officials who participated in the decision to give their testimony--in court or by affidavit--explaining their actions.³⁸⁵ The only other alternative available to the court is to set the agency action aside and remand the case to the agency for further consideration.³⁸⁶

In *Camp v. Pitts*³⁸⁷ the Supreme Court held that, where any explanation at all appears in the administrative record, *post hoc* testimony should not be allowed. The validity of the agency's informal rulemaking must then stand or fall on the propriety of the explanation appearing in the administrative record. And if the record is inadequate to support the agency action, as judged by the appropriate standard of review, the court should vacate the agency decision and remand the matter to the agency for further consideration.³⁸⁸

The procedures applicable to formal rulemaking and adjudication contain detailed requirements for compiling an administrative record.³⁸⁹ For example the APA requires that formal findings be made and that these findings and any formal rule, order, or sanction be supported by substantial evidence contained in the whole administrative record.³⁹⁰ In applying the substantial evidence test, the court may not consider any matters outside the record developed by the agency contemporaneously with its decisional process.³⁹¹

NOTES

1. The term "action," unless otherwise qualified in Chap. V, refers broadly to any matter involving a federal agency which is the subject of the plaintiff's complaint. For example, "action" includes a formal or informal decision, rule, or order approved or promulgated by the agency. "Action" also includes agency inaction, such as a refusal or failure to respond to a

request or demand by the plaintiff. Also, "action" may be the actual conduct of any agency employee or official, regardless of rank.

²Generally, a suit against a federal agency may be brought in a state court, but is removable by the agency to federal court. See 28 U.S.C. § 1442 (1976). See generally MOORE, 1A MOORE'S FEDERAL PRACTICE ¶ 0.164. The state court would then lose all power over the suit. See 28 U.S.C. § 1446 (1976). See also 1A MOORE'S FEDERAL PRACTICE ¶ 0.168 [3.-8.].

³5 U.S.C. §§ 500 *et seq.* (1976).

⁴16 U.S.C. §§ 1600 *et seq.* (1976).

⁵The only exception is the Supreme Court's original jurisdiction. Article III is self-executing in this respect. *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1973).

⁶See *Califano v. Sanders*, 430 U.S. 99 (1977).

⁷5 U.S.C. § 702 (1976).

⁸*Id.*

⁹430 U.S. 99 (1977).

¹⁰*Id.* at 104 n.4 (citing cases).

¹¹*Id.* at 105 (citing cases).

¹²*Id.* at 106 n.6.

¹³See 42 U.S.C. § 205(g) (1976).

¹⁴See 430 U.S. at 108-09. Sometimes, federal court jurisdiction is limited to the type of relief sought. For example, except for certain tax suits (see 28 U.S.C. § 1507 (1976)), the jurisdiction of the Court of Claims is limited to suits against the United States for money damages. Therefore a party seeking equitable relief in a non-tax suit against the United States may not bring his action in the Court of Claims. See *United States v. King*, 395 U.S. 1 (1969). Note, also, that Tucker Act money claims over \$10,000 must be brought in the Court of Claims, while smaller claims may be brought in the district court or the Court of Claims. 28 U.S.C. §§ 1346(a)(2), 1491 (1976). See also Chap. V.A.8 *infra*.

¹⁵Where mandamus of a federal officer is sought, section 1331 need not be relied upon, since 28 U.S.C. § 1361 (1976) gives the federal district court original jurisdiction of any action "in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." Prior to enactment of section 1361 in 1962, only the district court for the District of Columbia had mandamus jurisdiction. *Kendall v. United States*, 37 U.S. (12 Pet.) 524 (1838). See also Chap. V.A.5.a., *infra*.

¹⁶See text accompanying note 8 *supra*.

¹⁷It also creates a presumption in favor of judicial review generally. See Chap. V.A.6, *infra*.

¹⁸397 U.S. 150 (1970).

¹⁹405 U.S. 727 (1972).

²⁰412 U.S. 669 (1973).

²¹12 U.S.C. § 1864 (1976).

²²The Court also held that whether plaintiff was *in fact* within the zone of interests sought to be protected by the Act went to the merits.

²³*Hardin v. Kentucky Utilities Co.*, 390 U.S. 1 (1968).

²⁴*Rhode Island Comm'n on Energy v. General Services Adm'n*, 561 F.2d 397 (1st Cir. 1977). See *Tax Analysts & Advocates v. Blumenthal*, 566 F.2d 130 (D.C. Cir. 1977) (domestic oil producer lacked standing to challenge validity of tax credit given foreign competitors on ground the tax credit provision was designed to prevent double taxation of any American companies operating abroad, and not to protect competitors).

²⁵The Court also held, however, that general allegations of such injuries are insufficient; that it was not enough that the plaintiff has expertise in the subject matter and is considered a good representative of the public. The plaintiff was required to show that some of its members actually used the national park in question, or at least lived in the area.

²⁶412 U.S. at 689 n.14.

²⁷42 U.S.C. § 7604 (1976).

²⁸See also *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976).

²⁹*NRDC v. EPA*, 481 F.2d 116, 121 (10th Cir. 1973).

³⁰*Metropolitan Washington Coalition for Clean Air v. District of Columbia*, 511 F.2d 809, 814 n.26 (D.C. Cir. 1975).

³¹405 U.S. at 736.

³²*Cf.*, the *jus tertii* cases where plaintiffs have been allowed to assert the rights of other persons. *E.g.*, *Singleton v. Wulff*, 428 U.S. 106 (1976) (physician has standing to attack validity of state abortion welfare statute on behalf of his indigent patients); *Craig v. Boren*, 429 U.S. 190 (1977); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

³³422 U.S. 490, 513-14 (1975).

³⁴See FED. R. CIV. P. 12(b), (g), & (h).

³⁵See Chap. V.A.3., *infra*, for a detailed discussion of venue.

³⁶28 U.S.C. § 1391(e) (1976) provides in relevant part:

The summons and complaint in such an action [against the United States, a federal agency, or federal officer or employee acting in his official capacity or under color of legal authority] shall be served as provided by the Federal Rules of Civil Procedure except that the delivery of the summons and complaint to the officer or agency as required by the rules may be made by certified mail beyond the territorial limits of the district in which the action is brought.

³⁷FED. R. CIV. P. 4(d) provides in relevant part:

Service shall be made as follows:

. . .

(4) Upon the United States, by delivering a copy of the summons and of the complaint to the United States attorney for the district in which the action is brought or to an assistant United States attorney or clerical employee designated by the United States attorney in a writing filed with the clerk of the court and by sending a copy of the summons and of the complaint by registered or certified mail to the Attorney General of the United States at Washington, District of Columbia, and in any action attacking the validity of an order of an officer or agency of the United States not made a party, by also sending a copy of the summons and of the complaint by registered or certified mail to such officer or agency.

(5) Upon an officer or agency of the United States, by serving the United States by delivering a copy of the summons and of the complaint to such officer or agency. . . .

³⁸28 U.S.C. § 1391(e) (1976), quoted in note 36, *supra*.

³⁹See Chap. V.A.1.a., *supra*.

⁴⁰See Chap. V.A.2., *supra*.

⁴¹28 U.S.C. § 1391(e) (1976) provides in relevant part:

A civil action in which a defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, or the United States, may, except as otherwise provided by law, be brought in any judicial district in which (1) a defendant in the action resides, or (2) the cause of action arose, or (3) any real property involved in the action is situated, or (4) the plaintiff resides if no real property is involved in the action. . . .

⁴²28 U.S.C. § 1392(b) (1976).

⁴³*Id.* at § 1391(e).

⁴⁴See, e.g., Chase Savings & Loan Ass'n v. Federal Home Loan Bank Board, 269 F. Supp. 965 (E.D. Pa. 1967).

⁴⁵See, e.g., Green v. Laird, 357 F. Supp. 227 (N.D. Ill. 1973).

⁴⁶Despite the amendment to 28 U.S.C. § 1391(e) (1976), joinder of the United States and private parties may still be precluded in some suits on a

theory unrelated to venue. It has always been clear that the Court of Claims may not entertain Tucker Act claims where private parties are additional defendants since that court has subject matter jurisdiction only over suits against the United States. The district court, however, has concurrent jurisdiction with the Court of Claims over Tucker Act claims not exceeding \$10,000. In *United States v. Sherwood*, 312 U.S. 584 (1941), the Supreme Court held that the United States and a private party could not be joined in the same action in the district court on the theory that the Court of Claims has concurrent jurisdiction over the Tucker Act claim, and since the private defendant could not have been sued in the Court of Claims, the action in the district court was not within the Court of Claims "concurrent jurisdiction." (A few courts have refused to follow *Sherwood* realizing that joinder of defendants under Rule 20 in no way affects subject matter jurisdiction, and vice versa. See *Baumgold Bros., Inc. v. Allan M. Fox Co.-East*, 336 F. Supp. 175 (N.D. Okla. 1971). Moreover, it has been held that the Tucker Act does not prevent consolidation in the district court with another action against a private defendant. See *United States v. Louisville & N.R.R. Co.*, 221 F.2d 698 (6th Cir. 1955). Admittedly, however, even if *Sherwood* retains vitality after the amendment to § 1391(e), it does not involve the APA, since Tucker Act claims cannot be brought under the APA. See Chap. V.A.8., *infra*.

⁴⁷See *Larson v. Domestic & Foreign Commerce Corps.*, 337 U.S. 682, 690 (1949). Cf. *Ex parte Young*, 209 U.S. 123 (1908), discussed in Chap. V.A.5.c., *infra*.

⁴⁸*Id.*

⁴⁹*Mandamus* is discussed in detail in Chap. V.A.5.a., *infra*.

⁵⁰28 U.S.C. § 1361 (1976).

⁵¹See Chap. V.A.5.a., *infra*.

⁵²See, e.g., *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682 (1949).

⁵³See the pre-1976 version of § 702 quoted at note 8, *supra*.

⁵⁴See, e.g., *Kingsbrook Jewish Medical Center v. Richardson*, 486 F.2d 663 (2d Cir. 1973). *Contra*, *Washington v. Udall*, 417 F.2d 1310 (9th Cir. 1969).

⁵⁵While Congress has generally waived sovereign immunity for money damages on contract and tort claims by the Tucker and Tort Claims Act, few statutes provide for a waiver of immunity regarding equitable relief. The most significant of these statutes involves property suits against the government. See 28 U.S.C. §§ 2409, 2409a, 2410 (1976).

⁵⁶See Chap. V.A.1., *supra*, and Chap. V.6., *infra*.

⁵⁷337 U.S. 682 (1949).

⁵⁸See 28 U.S.C. §§ 1346(a)(2), 1491 (1976).

⁵⁹See *United States v. King*, 395 U.S. 1 (1969).

⁶⁰See text accompanying notes 47 and 48 supra.

⁶¹337 U.S. at 695.

⁶²See Chap. V.A.7., infra.

⁶³28 U.S.C. §§ 1346(b), 1402(b), 1504, 2110, 2401(b), 2402, 2411, 2412, 2671-80 (1976). See also text accompanying note 120, infra.

⁶⁴28 U.S.C. §§ 1346(a)(2), 1491 (1976). See also text accompanying note 121 infra.

⁶⁵Mandamus relief is technically broader than the description in the text. A court may, in addition to compelling the performance of non-discretionary duties, order an official to make a decision in matters involving the exercise of discretion where the official has refused to make a decision at all. The court, however, may not direct or influence the officer or agency on the merits of the decision; it can only order the official to discharge its duty to make the decision itself. See *Greenblatt v. Dillon*, 238 F. Supp. 267 (E.D. Mo. 1964); *Indian & Michigan Electric Co. v. FPC*, 224 F. Supp. 166 (N.D. Ind. 1963). See also H.R. 1960, 2 U.S. CODE CONG. & AD. NEWS 2784 (1962).

⁶⁶42 U.S.C. § 603 (1976); *Minnesota v. Weinberger*, 359 F. Supp. 789 (D. Minn. 1973). See *Guerrero v. Garza*, 418 F. Supp. 182 (W.D. Wis. 1976) (Where, upon filing a proper complaint, the Secretary has failed or refuses to monitor or investigate the activities of farm labor contractors, the Secretary can be compelled to perform his duties under the Farm Labor Contractor Registration Act.).

⁶⁷*Switzerland Co. v. Udall*, 225 F. Supp. 812 (D.N.C.), aff'd, 338 F.2d 56 (4th Cir. 1964), cert. denied, 380 U.S. 914 (1965).

Section 706(1) provides that the reviewing court shall "compel agency action unlawfully withheld" This provision has been interpreted to apply only where mandamus relief is appropriate. For example, in *Silva v. Secretary of Labor*, 518 F.2d 301 (1st Cir. 1975), the court recognized that this provision of the scope of review statute referred to mandamus relief, but that such relief was inappropriate because the action fell within the area of agency discretion. Even where the Secretary's action had been arbitrary and capricious in refusing to issue a labor certificate in favor of an alien, mandamus was not available where there had been no showing that "the Secretary could on no conceivable ground decline to certify." 518 F.2d at 310. See Chap. V.E.3., infra.

⁶⁸See Chap. V.A.4., supra.

⁶⁹28 U.S.C. § 1361 (1976).

⁷⁰See Chap. V.A.5.a., supra.

⁷¹A qualification on this statement is discussed in note 66, supra.

⁷²See *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682 (1949), discussed in Chap. V.A.4., supra.

⁷³Id.

⁷⁴See Chap. V.A.4., supra.

⁷⁵See Chap. V.A.7.a., infra.

⁷⁶See Chap. V.A.5.b., supra.

⁷⁷See Chap. V.A.4. and V.A.5.b., supra.

⁷⁸Ex parte Young, 209 U.S. 123 (1908).

⁷⁹While Ex parte Young involved an issue of immunity under the Eleventh Amendment of the Constitution, which applies only to the states, the theory of the rule (and thus its application) has been applied to general sovereign immunity in suits against federal officers. See *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949).

⁸⁰For detailed discussion, see Chap. V.A.4., supra.

⁸¹360 U.S. 564 (1959). There was no opinion of the Court, only a four-justice plurality opinion. *Butz v. Economou*, ___ U.S. ___, 98 S. Ct. 2894, 2901 and n.11 (1978). While the viability of the plurality opinion in *Barr* was not at issue in *Butz v. Economou*, the Court cited it often with approval.

⁸²360 U.S. at 575.

⁸³See *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 456 F.2d 1339 (2d Cir. 1972).

⁸⁴Id.

⁸⁵*Butz v. Economou*, ___ U.S. ___, 98 S. Ct. 2894, 2902 (1978).

⁸⁶*Wood v. Strickland*, 420 U.S. 308 (1975). See also *O'Connor v. Donaldson*, 422 U.S. 563 (1975); *Procunier v. Navarette*, ___ U.S. ___, 98 S. Ct. 855 (1978). While these cases all involved suits against state officers, the Supreme Court has held that this qualified official immunity defense to constitutional suits against federal officials. *Butz v. Economou*, ___ U.S. ___, 98 S. Ct. 2894 (1978).

⁸⁷*Procunier v. Navarette*, ___ U.S. ___, 98 S. Ct. 855 (1978). Apparently, the defendant official has the burden of pleading the defense of official immunity but the plaintiff has the burden of proving the defense is not available. 88456 F.2d 1339 (2d Cir. 1972).

⁸⁹In other words, while the claim there was based on the Constitution, the court focused on the fact that the function (i.e., arrest) is non-discretionary.

⁹⁰The Supreme Court had earlier held in the same case that a federal cause of action for money damages exists for Fourth Amendment violations.

⁹¹The second element should not be confused with the requirement of probable cause under the Fourth Amendment. The plaintiff must, regardless of any defense, prove as part of his cause of action that the defendant acted without probable cause. The second element of the defense (i.e., that his good faith belief was reasonable), however, is less stringent than the constitutional probable cause requirement and is governed by the reasonable man standard in the general tort law. See 456 F.2d at 1348-49.

⁹²*Butz v. Economou*, ___ U.S. ___, 98 S. Ct. 2894 (1978); *Stump v. Sparkman*, ___ U.S. ___,

98 S. Ct. 1099 (1978); *Pierson v. Ray*, 386 U.S. 547 (1967).

⁹³*o'Shea v. Littleton*, 414 U.S. 488 (1974) (plaintiff lacks standing).

⁹⁴*Imbler v. Pachtman*, 424 U.S. 409 (1974).

⁹⁵*Id.* 424 U.S. at 423 n.20 (dicta).

⁹⁶*Butz v. Economou*, ___ U.S. ___, 98 S. Ct. 2894 (1978) (dicta).

⁹⁷*Id.* Also, legislators are immune when acting in a sphere of legitimate legislative activity, *i.e.*, in a field where legislators traditionally have power to act, such as in committees. *Tenney v. Brandhove*, 341 U.S. 367 (1951).

⁹⁸___ U.S. ___, 98 S. Ct. 2894 (1978).

⁹⁹For a detailed discussion of what constitutes an "adjudicatory" proceeding, see Chap. V.B., *infra*.

¹⁰⁰See Chap. V.A.5., *supra*.

¹⁰¹The pre-1976 version of § 702 is quoted in Chap. V.A.1.a., *supra*.

¹⁰²*Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967), *quoting* *Rusk v. Cort*, 369 U.S. 367, 379-80 (1962).

¹⁰³*Abbott Laboratories v. Gardner*, 387 U.S. at 140.

¹⁰⁴See 50 U.S.C. § 1221 (1970); *Renegotiation Board v. Bannerkraft Clothing Co.*, 415 U.S. 14 (1974).

¹⁰⁵See 26 U.S.C. § 7421 (1976); *Bob Jones University v. Simon*, 416 U.S. 725 (1974).

¹⁰⁶Of course, a tort suit for money damages could not be brought under the APA in any event since the Tort Claims Act provides for an alternative "adequate remedy in a court." See § 704 of the APA discussed in Chap. V.A.8., *infra*.

¹⁰⁷Whether a purely discretionary agency action is unreviewable by virtue of § 701(a)(2) of the APA is discussed in Chap. V.E., *infra*.

¹⁰⁸See discussion of § 702(2) in Chap. V.A.7., *infra*.

¹⁰⁹See Chap. V.A.6., *supra*.

¹¹⁰5 U.S.C. § 702 (1976) (emphasis added).

¹¹¹H.R. REP. NO. 94-1656, Sept. 22, 1976, accompanying S. 800 re. Pub. L. No. 94-574, 90 Stat. 2721.

¹¹²See Chap. V.A.4., *supra*.

¹¹³Section 704 provides:

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or

determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

¹¹⁴See, *e.g.*, *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967) (holding that an FDA regulation was "final" for purposes of judicial review upon its promulgation; plaintiffs did not have to wait until an enforcement proceeding was brought for violation of the challenged regulation).

¹¹⁵See also discussion in Chap. V.A.7., *supra*.

¹¹⁶See note 113, *supra*.

¹¹⁷*Id.*

¹¹⁸*Id.*

¹¹⁹See 28 U.S.C. § 2342 (1976).

¹²⁰See *id.* at § 2679. See also discussion in Chap. V.A.6., *supra*.

¹²¹*Alabama Rural Fire Ins. Co. v. Naylor*, 530 F.2d 1220 (5th Cir. 1976).

The following examples are not relevant to the Forest Service but further illustrate this requirement of § 704. See, *e.g.*, *Brown v. General Services Administration*, 425 U.S. 836 (1976) (42 U.S.C. § 2000e-16 (1976) of the Equal Employment Opportunity Act of 1972 created the exclusive judicial remedy for racial discrimination against federal employees); *Vogel v. Gottschalk*, 350 F. Supp. 865 (E.D. Va. 1972) (plaintiff complaining of arbitrary administrative action in a patent interference proceeding had an adequate remedy under 35 U.S.C. § 146 (1976)). Cf., *United States v. Demko*, 385 U.S. 149 (1966) (18 U.S.C. § 4126 (1976), providing for compensation to federal prisoners for industrial injuries is the exclusive judicial remedy thus barring suits under the Tort Claims Act). But see *Gordon v. New York Stock Exchange, Inc.*, 422 U.S. 659, 690 n.15 (1975) ("We note, of course, that judicial review of SEC action is available under the APA, 5 U.S.C. §§ 702 and 704, or under § 25 of the Securities Exchange Act, 15 U.S.C. § 78y. See also *Independent Broker-Dealers Trade Ass'n v. SEC*, 142 U.S. App. D.C. 384, 442 F.2d 132, cert. denied, 404 U.S. 828 (1971).").

¹²²16 U.S.C. § 831c(b) (1976). See *Natural Resources Defense Council v. TVA*, 459 F.2d 255 (2d Cir. 1972).

¹²³Usually, such statutes are referred to as "organic" or "enabling" statutes.

¹²⁴For example, the rules of evidence for agency proceedings are usually not as strict as the rules of evidence for court trials. See, *e.g.*, *School Bd. of Broward County v. H.E.W.*, 525 F.2d 900 (5th Cir. 1976) (hearsay evidence is admissible).

¹²⁵See Chap. V.E., *infra*.

¹²⁶79th Cong., 2d Sess. 1946 (Congressional Report) at 1205. The procedures referred to in the Congressional Report are contrasted in Chap. V.C. and D., *infra*.

¹²⁷See Chap. V.B.2., 3., and 4., *infra*.
¹²⁸See 5 U.S.C. §§ 554-57 (1976), discussed in Chap. V.C., *infra*.

¹²⁹See 5 U.S.C. § 533 (1976), discussed in Chap. V.D., *infra*.

¹³⁰ . . . In the "rule making" (that is, "legislative") function [the APA] provides that with certain exceptions agencies must publish notice and at least permit interested parties to submit their views in writing for agency consideration before the issuance of general regulations (sec. 4) [5 U.S.C. § 553]. No hearings are required by this bill unless statutes already do so in a particular case. Similarly in "adjudication" (that is, the "judicial" function) no agency hearings are required unless statutes already do so, but in the latter case the mode of hearing and existing statutes require that either general regulations (called "rules" in the bill) or particularized adjudications (called "orders" in the bill) be made after agency hearing or opportunity for such hearing. Then section 7 [5 U.S.C. § 556] spells out the minimum requirements for such hearings, section 8 [5 U.S.C. § 557] states how decisions shall be made hereafter, and section 11 [5 U.S.C. § 3105] provides for examiners to preside at hearings and make or participate in decisions.

79th Cong., 2d Sess. 1946 (Congressional Report) at 1205.

¹³¹See Note, 87 HARV. L. REV. 782, 784 (1974).

¹³²See 5 U.S.C. § 553 (1976), discussed in Chap. V.D., *infra*.

¹³³See *id.* at § 553(c), discussed in Chap. V.B.2., *infra*. The formal procedures of the APA also govern processing applications "made for a license required by law." 5 U.S.C. § 558(c) (1976).

¹³⁴See Chap. V.B.4., *infra*.

¹³⁵See Chap. V.B.2., and 3., *infra*.

¹³⁶See detailed discussion in Chap. V.E., *infra*.

¹³⁷See Chap. V.B.1., *supra*.

¹³⁸See Chap. V.C., *infra*. An informal rule may also be adopted through the process of adjudication. See Chap. V.B.4., *infra*.

¹³⁹410 U.S. 224, 236 (1973).

¹⁴⁰410 U.S. at 238 (dictum).

¹⁴¹See *United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742 (1972).

¹⁴²See Chap. V.B.1., *supra*.

¹⁴³Section 553 procedures are discussed in Chap. V.D.1., *infra*.

¹⁴⁴Sections 554-57 procedures are discussed in Chap. V.C., *infra*.

¹⁴⁵5 U.S.C. § 551(5) (1976).

¹⁴⁶*Id.* at § 551(4). See discussion in Chap. V.B.1., *supra*, of the quasi-legislative character of rulemaking.

¹⁴⁷*Id.* at § 551(7).

¹⁴⁸*Id.* at § 551(6). See discussion in Chap. V.B.1., *supra*, of the quasi-judicial character of adjudication.

Agency licensing usually does not raise the problems discussed here, because the APA expressly provides that the adjudication procedures of the APA (5 U.S.C. §§ 556 and 557) must be followed in passing on an application for a license required by law. 5 U.S.C. § 558(c) (1976).

¹⁴⁹5 U.S.C. § 551(6) (1976).

¹⁵⁰*Id.*

¹⁵¹And see *N.L.R.B. v. Wyman-Gordon*, 394 U.S. 759 (1969), discussed in Chap. V.B.4., *infra*, in which the Court examined the propriety of an agency issuing a non-injunctive order having only prospective effect.

¹⁵²See discussion in Chap. V.B.4., *infra*.

¹⁵³See Chap. V.B.1., *supra*.

¹⁵⁴But see *N.L.R.B. v. Wyman-Gordon*, 394 U.S. 759 (1969), discussed in Chap. V.B.4., *infra*, in which the order was not directed towards the parties to the adjudication.

¹⁵⁵5 U.S.C. § 551(4) (1976) (emphasis added).

¹⁵⁶See Chap. V.B.3., *supra*.

¹⁵⁷210 U.S. 373 (1908).

¹⁵⁸239 U.S. 441 (1915).

¹⁵⁹410 U.S. 224 (1973).

¹⁶⁰Actually, the rates were per diem charges to the railroad for using box cars owned by any other railroad.

¹⁶¹410 U.S. at 245, *quoting Bi-Metallic*, 239 U.S. at 446.

¹⁶²482 F.2d 1301 (10th Cir. 1973).

¹⁶³*Id.* at 1303.

¹⁶⁴*Id.* at 1306-07.

¹⁶⁵But *cf.*, *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956). The Supreme Court upheld the validity of an FCC informal rule prohibiting the ownership of more than a specified number of stations by one entity. Under the FCC rule, all applications for licenses which were in violation of the rule were denied without the hearing, which would normally be required. See 5 U.S.C. § 558(c) (1976). The effect of the informal rule was to cut off the right to a hearing required by the adjudicatory procedures of the APA. The Court did say, however, that an applicant should be allowed to accompany his application with a supported request to change or waive the rule.

¹⁶⁶*Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, ___ U.S. ___, 98 S. Ct. 1197, 1202, 1212 (1978). See detailed discussion in Chap. V.D.1., *infra*.

¹⁶⁷Clagg, Informal Action--Adjudication--Rule Making: Some Recent Developments in Federal Administrative Law, 1971 DUKE L.J. 51, 53, 85, quoted with approval in Appalachian Power Co. v. Environmental Protection Agency, 477 F.2d 495, 500 (4th Cir. 1973). See also 1 DAVIS, ADMINISTRATIVE LAW TREATISE § 5.01 at 286; Robinson, The Making of Administrative Policy: Another Look at Rule Making and Adjudication and Administrative Procedure Reform, 118 U. PA. L. REV. 485, 500 (1970); Boyer, Alternative to Administrative Type Hearings for Resolving Complex Scientific, Economic and Social Issues, 71 MICH. L. REV. 111, 112-14 (1972).

¹⁶⁸477 F.2d 495 (4th Cir. 1973).

¹⁶⁹Id. at 501 (footnotes omitted).

¹⁷⁰458 F.2d 731 (D.C. Cir. 1971), cert. denied, 405 U.S. 1074 (1972).

¹⁷¹Mobil Oil Corp. v. F.P.C., 483 F.2d 1238, 1251-52 (D.C. Cir. 1973).

¹⁷²449 F.2d 1009, 1015 (D.C. Cir. 1971).

¹⁷³See also Judge Leventhal's opinion in Marine Space Enclosures, Inc. v. Federal Maritime Comm'n, 420 F.2d 577, 589 & n.36 (D.C. Cir. 1969), which includes a good discussion of the flexible procedural devices available to an agency, assuming a hearing is held either by agency choice or requirement of statute:

The requirement of a hearing in a proceeding before an administrative agency may be satisfied by something less time-consuming than a courtroom drama. In some cases briefs and oral argument may suffice for disposition. Whether briefs and oral argument are sufficient depends on the nature of the issues. There is more need for an evidentiary hearing when there are underlying questions of fact. The kind of procedure that is appropriate may turn on whether the issue is one that involves a technical judgment . . . and the importance of the underlying substantive issue.

See Home Box Office, Inc. v. F.C.C., 567 F.2d 9, 54-57 (D.C. Cir. 1977) suggesting that regardless of what procedural requirements are imposed, the essence of a hearing is that there be an exchange of views.

¹⁷⁴Chap. V.B.3., supra.

¹⁷⁵Id.

¹⁷⁶See discussion in Chap. V.B.1., supra, and Part V.D.1., infra.

¹⁷⁷332 U.S. 194 (1947).

¹⁷⁸See Chap. V.B.1. and 3., supra.

¹⁷⁹Accord, see National Nutritional Foods Ass'n v. Weinberger, 512 F.2d 688, 698 (2d Cir.), cert. denied, 423 U.S. 827 (1975).

¹⁸⁰332 U.S. at 203.

¹⁸¹See N.L.R.B. v. Bell Aerospace Co., Div. of Textron, Inc., 416 U.S. 267 (1974). (Because of the specialized skills required of buyers in the aerospace industry, the Court agreed with the

Board that defining by rule what constitutes a "managerial employee" would be impracticable, if not impossible.).

¹⁸²394 U.S. 756 (1969).

¹⁸³Excelsior Underwear, Inc., 156 N.L.R.B. 1236 (1966).

¹⁸⁴For detailed discussion of informal rule-making procedures, see Chap. V.D., infra.

¹⁸⁵394 U.S. at 766.

¹⁸⁶The concurring justices were apparently relying on the APA which defines a rule as "an agency statement of . . . future effect" 5 U.S.C. § 551(4) (1976). But the APA defines an order as also including an agency disposition which is declaratory in form. The definition also includes an injunction which, by its nature, is prospective only. 5 U.S.C. § 551(d). See detailed discussion in Chap. V.B.3., supra.

¹⁸⁷See Chap. V.E.3., infra. See also Chap. V.C., infra.

¹⁸⁸See Chap. V.E.3., infra.

¹⁸⁹See Chap. V.E.3., infra.

¹⁹⁰Compare Chap. V.E.4. and 5., infra.

¹⁹¹5 U.S.C. §§ 554-57 (1976).

§ 554. Adjudications

(a) This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved -

(1) a matter subject to a subsequent trial of the law and the facts de novo in a court;

(2) the selection of tenure of an employee, except a hearing examiner appointed under section 3105 of this title;

(3) proceedings in which decisions rest solely on inspections, tests, or elections;

(4) the conduct of military or foreign affairs functions;

(5) cases in which an agency is acting as an agent for a court; or

(b) Persons entitled to notice of an agency hearing shall be timely informed of -

(1) the time, place, and nature of the hearing;

(2) the legal authority and jurisdiction under which the hearing is to be held; and

(3) the matters of fact and law asserted.

When private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues contravened in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the time and place for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

(c) The agency shall give all interested parties opportunity for -

(1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit; and

(2) to the extent that the parties are unable so to determine a controversy by consent, hearing and decision on notice and in accordance with sections 556 and 557 of this title.

(d) The employee who presides at the reception of evidence pursuant to section 556 of this title shall make the recommended decision or initial decision required by section 557 of this title, unless he becomes unavailable to the agency. Except to the extent required for the disposition of ex parte matters as authorized by law, such an employee may not -

(1) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate; or

(2) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.

An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings. This subsection does not apply

(A) in determining applications for initial licenses;

(B) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; or

(C) to the agency or a member or members of the body comprising the agency.

(e) The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty.

§ 556. Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision

(a) This section applies, according to the provisions thereof, to hearings required by section 553 or 554 of this title to be conducted in accordance with this section.

(b) There shall preside at the taking of evidence -

(1) the agency;

(2) one or more members of the body which comprises the agency; or

(3) one or more hearing examiners appointed under section 3105 of this title.

This subchapter does not supersede the conduct of specified classes of proceedings, in whole or in part, by or before boards or other employees specially provided for by or designated under statute. The functions of presiding employees and of employees participating in decisions in accordance with section 557 of this title shall be conducted in an impartial manner. A presiding or participating employee may at any time disqualify himself. On the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee, the agency shall determine the matter as a part of the record and decision in the case.

(c) Subject to published rules of the agency and within its powers, employees presiding at hearings may -

(1) administer oaths and affirmations;

(2) issue subpoenas authorized by law;

(3) rule on offers of proof and receive relevant evidence;

(4) take depositions or have depositions taken when the ends of justice would be served;

(5) regulate the course of the hearing;

(6) hold conferences for the settlement or simplification of the issues by consent of the parties;

(7) dispose of procedural requests or similar matters;

(8) make or recommend decisions in accordance with section 557 of this title; and

(9) take other action authorized by agency rule consistent with this subchapter.

(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. The agency may, to the extent consistent with the interests of justice and the policy of the underlying statutes administered by the agency, consider a violation of section 557(d) of this title sufficient grounds for a decision adverse to a party who has knowingly committed such violation or knowingly caused such violation to occur. A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

(e) The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision in accordance with section 557 of this title and, on payment of lawfully prescribed costs, shall be made available to the parties. When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.

§ 557. Initial decisions; conclusiveness; review by agency; submissions by parties; contents of decisions; record

(a) This section applies, according to the provisions thereof, when a hearing is required to be conducted in accordance with section 556 of this title.

(b) When the agency did not preside at the reception of the evidence, the presiding employee or, in cases not subject to section 554(d) of this title, an employee qualified to preside at hearings pursuant to section 556 of this title, shall initially decide the case unless the agency requires, either in specific cases or by general rule, the entire record to be certified to it for decision. When the presiding employee makes an initial decision, that decision then becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within time provided by rule. On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule. When the agency makes the decision without having presided at the reception of the evidence, the presiding employee or an employee qualified to preside at hearings pursuant to section 556 of this title shall first recommend a decision, except that in rule making or determining applications for initial licenses -

(1) instead thereof the agency may issue a tentative decision or one of its responsible employees may recommend a decision; or

(2) this procedure may be omitted in a case in which the agency finds on the record that due and timely execution of its functions imperatively and unavoidably so requires.

(c) Before a recommended, initial, or tentative decision, or a decision on agency review of the decision or subordinate employees, the parties are entitled to a reasonable opportunity to submit for the consideration of the employees participating in the decisions -

(1) proposed findings and conclusions; or

(2) exceptions to the decisions or recommended decisions or subordinate employees or to tentative agency decisions; and

(3) supporting reasons for the exceptions or proposed findings or conclusions.

The record shall show the ruling on each finding, conclusion, or exception presented. All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of -

(A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and

(B) the appropriate rule, order sanction, relief, or denial thereof.

(d)(1) In any agency proceeding which is subject to subsection (a) of this section, except to the extent required for the disposition of ex parte matters as authorized by law -

(A) no interested person outside the agency shall make or knowingly cause to be made to any member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, an ex parte communication relevant to the merits of the proceeding;

(B) no member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, shall make or knowingly cause to be made to any interested person outside the agency an ex parte communication relevant to the merits of the proceeding;

(C) a member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of such proceeding who receives, or who makes or knowingly causes to be made, a communication prohibited by this subsection shall place on the public record of the proceeding:

(i) all such written communications;

(ii) memoranda stating the substance of all such oral communications; and

(iii) all written responses, and memoranda stating the substance of all oral responses, to the materials described in clauses (i) and (ii) of this subparagraph;

(D) upon receipt of a communication knowingly made or knowingly caused to be made a party in violation of this subsection, the agency, administrative law judge, or other employee presiding at the hearing may, to the extent consistent with the interests of justice and the policy of the underlying statutes, require the party to show cause why his claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation; and

(E) the prohibitions of this subsection shall apply beginning at such time as the agency may designate, but in no case shall they begin to apply later than the time at which a proceeding is noticed for hearing unless the person responsible for the communication has knowledge that it will be noticed, in which case the prohibitions shall apply beginning at the time of his acquisition of such knowledge.

(2) This subsection does not constitute authority to withhold information from Congress.

¹⁹²The agency has the discretion to dispense with an oral hearing under certain circumstances. 5 U.S.C. § 556(d) (1976) provides in relevant part: "In [formal] rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form."

¹⁹³5 U.S.C. § 556(d) (1976).

¹⁹⁴Id. Section 556(d) provides: "A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence." Section 556(e) continues: "The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision in accordance with section 557. . . ." Section 557(c) states: "The record shall show the ruling on each finding, conclusion, or exception presented. All decisions, including initial, recommended, and tentative decisions, are a part of the record" The importance of complying with these recordkeeping requirements for judicial review purposes is examined in Chap. V.E.3. and 6., infra.

¹⁹⁵See 5 U.S.C. § 554(d)(1) (1976). And see D.C. Federation of Civic Ass'ns v. Volpe, 459 F.2d 1231 (D.C. Cir. 1971) (dicta), cert. denied, 405 U.S. 1030 (1972).

¹⁹⁶For discussion of the procedural requirements for formal rulemaking and adjudication, see Chap. V.C., supra.

¹⁹⁷5 U.S.C. § 553 (1976) provides:

Rule making

(a) This section applies, according to the provisions thereof, except to the extent that there is involved -

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include -

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice of hearing is required by statute, this subsection does not apply -

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation.

After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except -

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

¹⁹⁸5 U.S.C. § 553(b) (1976).

¹⁹⁹Id. at § 553(c).

²⁰⁰For discussion of agency record requirements for purposes of judicial review, see Chap. V.E.6., infra.

²⁰¹Home Box Office, Inc. v. F.C.C., 567 F.2d 9, 54 (D.C. Cir. 1977).

²⁰²Id.

²⁰³Id.

²⁰⁴5 U.S.C. § 553(c) (1976).

²⁰⁵Id. at § 553(d).

²⁰⁶Section 553(c) expressly provides that the agency may conduct informal rulemaking "with or without the opportunity for oral presentation." See United States v. Florida East Coast Ry. Co., 410 U.S. 224 (1973) (also holding that there is no constitutional right to an oral hearing in every administrative hearing); Camp v. Pitts, 411 U.S. 138, 140-41 (1973); National Helium Corp. v. Morton, 455 F.2d 650, 656 (10th Cir. 1971).

²⁰⁷U.S. ___, 98 S. Ct. 1197, 1202 (1978).

²⁰⁸98 S. Ct. at 1211. See, e.g., Secretary of Agriculture v. United States, 347 U.S. 645, 652-53 (1954).

²⁰⁹Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., ___ U.S. ___, 98 S. Ct. 1197, 1213-14 (1978).

²¹⁰Ethyl Corp. v. EPA, 541 F.2d 1 (D.C. Cir.), cert. denied, 426 U.S. 941 (1976).

²¹¹Duke City Lumber Co. v. Butz, 382 F. Supp. 362 (D.D.C. 1974), aff'd and modified in part on other grounds, 539 F.2d 220 (D.C. Cir. 1976), cert. denied, 429 U.S. 1039 (1977).

²¹²Attorney General's Manual at p. 27 (1947).

"Public property" has also been given a similarly broad common law definition: "'Public property' is what belongs to the government - federal, state or municipal." State ex rel. Louisiana Imp. Co. v. Board of Assessors, 36 So. 91, 97, 111 La. 982 (1902). "'Public property' may be defined as that which is dedicated to the public use and over which the state exercised control and dominion." Hartman v. Tresise, 84 P. 685, 690, 36 Colo. 146 (1905).

²¹³City of Santa Clara v. Kleppe, 418 F. Supp. 1243 (N.D. Cal.), modified on other grounds, 428 F. Supp. 315 (N.D. Cal. 1976).

²¹⁴National Wildlife Fed'n v. Snow, 561 F.2d 227 (D.C. Cir. 1976). See also "Administrative Procedure Act, Legislative History," S. Doc. No. 248, 79th Cong., 2d Sess. (1946).

²¹⁵Joseph v. United States Civil Service Comm'n, 554 F.2d 1140 (D.C. Cir. 1977). See Seaboard World Airlines, Inc. v. Gronouski, 230 F. Supp. 44 (D.D.C. 1964) (regulation relating to expedition of overseas air mail held not exempted on similar grounds).

²¹⁶16 U.S.C. §§ 2101 et seq. (1976).

²¹⁷Stroud v. Benson, 155 F. Supp. 482 (E.D. N.C. 1957), vacated on other grounds, 254 F.2d 448 (4th Cir. 1958), cert. denied, 358 U.S. 817 (1958).

²¹⁸But see discussion in Chap. V.D.4., infra, of the Freedom of Information Act, 5 U.S.C. § 552 (1976). While § 553 may not apply due to § 553(b)(A), the FOIA generally requires publication of all agency rules--procedural as well as substantive. The net effect then is to require publication of almost all agency rules, but the requirement to afford an opportunity for public comment may be excepted under § 553.

²¹⁹5 U.S.C. § 553(b)(A) (1976). While § 553(b) by its terms refers only to "this subsection" (§ 553(b)), i.e., the notice provision, the public comment requirement (§ 553(c)) would also be excepted, since that subsection requires that opportunity for public comment be made only "[a]fter notice required by this section." Thus, if one of the exceptions applies, all of the rule making procedures of § 553 are inapplicable. And see N.L.R.B. v. Wyman-Gordon, 394 U.S. 759, 764 n.2 (1969).

²²⁰See Lodge 1647 and Lodge 1904, American Federation of Government Employees v. McNamara, 291 F. Supp. 286 (M.D. Pa. 1968).

²²¹Pacific Lighting Service Co. v. FPC, 518 F.2d 718 (9th Cir.), cert. denied, 423 U.S. 1000 (1975).

²²²Continental Oil Co. v. Burns, 317 F. Supp. 194 (D. Del. 1970).

²²³Commonwealth of Pennsylvania v. United States, 361 F. Supp. 208 (M.D. Pa.), aff'd without opinion, 414 U.S. 1017 (1973).

²²⁴5 U.S.C. § 553(b)(B) (1976).

²²⁵Mader v. Sawhill, 514 F.2d 1064 (Emerg. Ct. App. 1975). Compare Appalachian Power Co. v.

Environmental Protection Agency, 477 F.2d 495 (4th Cir. 1973) where the EPA argued that its review and approval of a state implementation plan regulating air pollution, as then provided by 42 U.S.C. § 185h-5 (1970) (amended and incorporated into § 7410(a) by the 1977 amendments to the Clean Air Act), was excepted by § 553(b)(3)(B) from the procedural requirements of § 553. The court agreed on the assumption that all interested persons had already had a reasonable opportunity to present, in an appropriate hearing before the state authorities, their objections to the proposed plan.

²²⁶See Chap. V.B.2.c., supra.

²²⁷See discussion in Reeves v. Simon, 507 F.2d 455 (Emergency Ct. of App. 1974) (existence of long lines at gasoline stations and related violence constituted good cause for Federal Energy Administration to deviate from 30-day notice requirement regarding rule prohibiting gasoline stations from refusing to sell gasoline to anyone who was not a regular customer; court found good cause satisfied § 553(b)(B), therefore did not need to reach issue of good cause under § 553(d)(3)), cert. denied, 420 U.S. 991 (1975).

²²⁸National Wildlife Fed'n v. Snow, 561 F.2d 227, 231 (D.C. Cir. 1976). See Strauss, Rules, Adjudication, and Other Sources of Law in an Executive Department: Reflections on the Interior Department's Administration of the Mining Law, 74 COLUM. L. REV. 1231, 1249 (1974).

²²⁹36 Fed. Reg. 13804.

²³⁰Rodway v. United States Dept. of Agriculture, 514 F.2d 809 (D.C. Cir. 1975).

²³¹Florida v. Weinberger, 401 F. Supp. 760 (D.D.C. 1975).

²³²City of New York v. Diamond, 379 F. Supp. 503 (S.D.N.Y. 1974).

²³³Id.

²³⁴Nuclear Data, Inc. v. AEC, 344 F. Supp. 719 (N.D. Ill. 1972).

²³⁵5 U.S.C. § 552(b)(2) (1976). See City of Santa Clara v. Kleppe, 418 F. Supp. 1243 (N.D. Cal.), modified on other grounds, 428 F. Supp. 315 (N.D. Cal. 1976).

Section 552 provides, in relevant part:

Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public -

...

(C) rules of procedure, descriptions of forms available or the places at which forms

may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. . . .

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying -

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and

(C) administrative staff manuals and instructions to staff that affect a member of the public;

unless the materials are promptly published and copies offered for sale. . . .

(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (a) reasonably describes such records and (b) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

(4)(A) In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying a uniform schedule of fees applicable to all constituent units of such agency. . . .

(b) This section does not apply to matters that are -

. . .

(2) related solely to the internal personnel rules and practices of an agency;

. . .

(d) On or before March 1 of each calendar year, each agency shall submit a report covering the preceding calendar year to the Speaker of the House of Representatives and President of the Senate for referral to the appropriate committees of the Congress. The report shall include -

. . .

(5) a copy of every rule made by such agency regarding this section;

. . .

(emphasis added).

²³⁶While many of the Forest Service rules fall within the § 553(a) exceptions, see Chap. V.D.2., supra, the Forest Service has waived those exceptions by a regulation stating that it has agreed to comply with the informal rule-making procedures of the APA. See Chap. V.D.3., supra.

²³⁷See Chap. V.D.4., supra.

²³⁸16 U.S.C. § 1612(a) (1976).

²³⁹These procedural rules are informal, rather than formal rules because the provisions of § 553(c), which dictate when rulemaking must comply with adjudicatory procedures, do not apply. See Chap. V.B.2., supra.

²⁴⁰See Chap. V.D.2., supra.

²⁴¹See Chap. V.D.4., supra.

²⁴²See Chap. V.B.3., supra.

²⁴³See explanation in notes 236 and 239, supra.

²⁴⁴See Chap. V.D.4., supra.

²⁴⁵See Chap. V.D.1., supra.

²⁴⁶Id.

²⁴⁷Id.

²⁴⁸See Chap. V.D.4., supra.

²⁴⁹See discussion under Chap. V.D.5., infra.

²⁵⁰See Chap. V.D.5., infra.

²⁵¹See Chap. V.D.2., supra.

²⁵²Id.

²⁵³These rules are informal rather than formal. See explanation in note 239, supra.

²⁵⁴See Chap. V.D.5., infra.

²⁵⁵Section 1612(a) requirements apply not just to rules adopted under NFMA, but to any Forest Service rules. See Chap. V.D.5., supra.

²⁵⁶See detailed discussion of procedural aspects of § 1601(C) in Chap. V.D.5., infra.

²⁵⁷See detailed discussion of procedural aspects of §§ 1604(d) & (g) in Chap. V.D.5., infra.

²⁵⁸See note 257, supra.

²⁵⁹See discussion of § 1612(a) in Chap. V.D.5., supra, and 5 U.S.C. § 553(c) (1976) in Chap. V.D.1., supra.

²⁶⁰Id.

²⁶¹*Vermont Yankee Nuclear Power Corp. v. N.R.D.C.*, ___ U.S. ___, 98 S. Ct. 1197 (1978), discussed in Chap. V.D.1., supra.

²⁶²16 U.S.C. § 1604(d) (1976) (emphasis added). See 16 U.S.C. § 1604(f)(5) (1976).

²⁶³See Chap. V.C., supra, for discussion of the trial-type hearing requirements for formal rulemaking and adjudications.

²⁶⁴In agency law, the term "regulation" is synonymous with "rule." The rules covered by § 1604(g) are informal, rather than formal rules. See discussion in note 239, supra.

²⁶⁵See Chap. V.D.5., supra.

²⁶⁶See *Vermont Yankee Nuclear Power Corp. v. N.R.D.C.*, ___ U.S. ___, 98 S. Ct. 1197 (1978). See also Chap. V.D.1., supra.

²⁶⁷See *Vermont Yankee Nuclear Power Corp. v. N.R.D.C.*, ___ U.S. ___, 98 S. Ct. 1197 (1976).

²⁶⁸42 U.S.C. §§ 4321 et seq. (1976). See discussion of NEPA in Chap. IV, supra.

²⁶⁹See Chap. V.D.2., supra.

²⁷⁰See Chap. V.D.2., supra.

²⁷¹If judicial review lies in the district court, the plaintiff files a complaint in the appropriate district court, see Chap. V.A., supra. If judicial review lies in the U.S. Court of Appeals, a petition for review is filed in the appropriate court of appeals. See Chap. V.A.8., supra.

²⁷²See Chap. V.A.1.a., supra.

²⁷³See Chap. V.A.1.b., supra.

²⁷⁴See Chap. V.A.4., supra.

²⁷⁵See Chap. V.A.7., supra.

²⁷⁶See Chap. V.E.2.-5., infra.

²⁷⁷See Chap. V.E.6., infra.

²⁷⁸See Chap. V.E.4. and 5., infra.

²⁷⁹See Chap. V.E.3.g., infra.

²⁸⁰5 U.S.C. § 706 (1976).

²⁸¹Id. at § 701(a)(2).

²⁸²See remarks of Senator McCarren, 32 A.B.A.J. 827, 831 & n.31 (1946); Berger, *Administrative Arbitrariness and Judicial Review*, 65 COLO. L. REV. 55, 61 (1976).

²⁸³*Overseas Media Corp. v. McNamara*, 385 F.2d 308 (D.C. Cir. 1967); *Heisler v. Parsons*, 312 F.2d 172 (7th Cir. 1962). See also cases cited in note 288, infra.

²⁸⁴*Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971); *Abbott Laboratories v. Gardner*, 387 U.S. 137 (1967), citing *Rusk v. Cort*, 369 U.S. 367, 379-80 (1962). See Chap. V.A.6. and 7., supra.

²⁸⁵401 U.S. 402 (1971).

²⁸⁶Id. at 410, quoting S. REP. NO. 752, 79th Cong., 1st Sess. 26 (1945).

²⁸⁷5 U.S.C. §§ 701(a)(2), 706(2)(A) (1976).

²⁸⁸401 U.S. at 410. See also *Dubrow v. SBA*, 345 F. Supp. 4 (C.D. Cal. 1972) (under the Disaster Relief Act of 1970, 42 U.S.C. § 4451 (1976), the SBA is charged with making and administering loans as, in its discretion, may be "necessary or appropriate." While the court held that the criteria for making loans is committed to agency discretion by law, it stated that no abuse of discretion had been proven.); *Reece v. United States*, 455 F.2d 240, 242 (9th Cir. 1972) (The court stated that promotion or nonpromotion within the ranks of government civil service employees involves a supervisory discretion and is not appropriate for judicial review; but "if there is a patent abuse of discretion, a court will review the action taken, notwithstanding the language of section 701(a)(2) [of the APA.]"; *Secretary of Labor v. Farino*, 490 F.2d 885 (7th Cir. 1973) (The Immigration and Nationality Act, 8 U.S.C. § 1182 (1976), provides for issuance of permanent visas to aliens only when the Secretary of Labor has determined that there are insufficient workers in the United States able, willing, qualified, and available in the area to perform specific work tasks. The court found that since the statute provided for specific guidelines in exercising this authority, there was "some law" to be applied, but that the Secretary had not acted arbitrarily or capriciously.); *Bell Lines, Inc. v. United States*, 306 F. Supp. 209, 213 (S.D.W. Va. 1969) ("Agency action committed to agency discretion contemplates and implies a lawful exercise of discretion. Agency action which is arbitrary and capricious abuses discretion and constitutes an unlawful exercise of discretion." Held, I.C.C. determination that one freight line should be expanded into the territory of others over protests was a discretionary act and not arbitrary, capricious, or an abuse of discretion.).

²⁸⁹512 F.2d 706 (9th Cir. 1975).

²⁹⁰16 U.S.C. § 497 (1976).

²⁹¹512 F.2d at 716.

²⁹²These allegations, however, proved to be wholly without merit, apparently because the regulations, manual, and board decisions were irrelevant, i.e., did not purport to regulate or restrict the exercise of discretion regarding use permits.

²⁹³455 F. Supp. 937 (D. Ariz. 1978).

²⁹⁴Id. at 938, quoting *City of Santa Clara v. Andrus*, 572 F.2d 660, 666 (9th Cir. 1978). See also *Bell v. Apache Maid Cattle Co.*, 94 F.2d 847, 850 (9th Cir. 1938).

²⁹⁵*Ness Investment Co. v. U.S.D.A., Forest Service*, 512 F.2d 706, 717 (9th Cir. 1975).

²⁹⁶6 U.S.C. § 706 (1976) (first sentence).

²⁹⁷429 U.S. 24 (1976).

²⁹⁸The Court suggested, however, that if a statute required particular findings to be made "in each case" they might be mandatory regardless of the ground of agency disposition.

²⁹⁹5 U.S.C. § 706 (1976) (first sentence).

³⁰⁰*Id.* at § 706(2)(A).

³⁰¹*Id.* at § 706(2)(B).

³⁰²*Toilet Goods Ass'n v. Gardner*, 360 F.2d 677 (2d Cir. 1966), *aff'd*, 387 U.S. 158, 167 (1967).

³⁰³*Hanly v. Kleindienst*, 471 F.2d 823 (2d Cir. 1972).

³⁰⁴*Id.*

³⁰⁵*Id.* at 829.

³⁰⁶See *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (EEOC's guidelines, interpreting the Civil Rights Act of 1964, provided that intelligence tests for job applicants must be job related).

³⁰⁷305 F. Supp. 1312 (N.D. Miss. 1969).

³⁰⁸5 U.S.C. § 706(1) (1976).

³⁰⁹See, e.g., *Silva v. Secretary of Labor*, 518 F.2d 301 (1st Cir. 1975).

³¹⁰See Chap. V.A.5.a., *supra*.

³¹¹5 U.S.C. § 706(1) (1976).

³¹²*Environmental Defense Fund, Inc. v. Hardin*, 428 F.2d 1093 (D.C. Cir. 1970).

³¹³*Chromcraft Corp. v. United States Equal Employment Opportunity Comm'n*, 465 F.2d 745 (5th Cir. 1972).

³¹⁴5 U.S.C. § 706 (1976) (first sentence).

³¹⁵*Id.* at § 706(2)(A).

³¹⁶See Chap. V.E.2., *supra*.

³¹⁷*Pullman, Inc. v. Volpe*, 337 F. Supp. 432, 436 (E.D. Pa. 1971), *citing* *Rasmussen v. United States*, 421 F.2d 776 (8th Cir. 1970); *Mallohan v. Gray*, 413 F.2d 349 (9th Cir. 1969).

³¹⁸*Pullman, Inc. v. Volpe*, 337 F. Supp. 432 (E.D. Pa. 1971), *citing* *Panama Canal Co. v. Grace Lines, Inc.*, 356 U.S. 309 (1958); *Kendler v. Wirty*, 388 F.2d 381 (3d Cir. 1968).

³¹⁹*Id.* Cf., discussion in Chap. V.E.3.b., *supra*.

³²⁰49 U.S.C. § 1602(a) (1976).

³²¹*Pullman, Inc. v. Volpe*, 337 F. Supp. 432 (E.D. Pa. 1971). But cf. *Ness Investment Corp. v. U.S.D.A., Forest Service*, 512 F.2d 706 (9th Cir. 1975) which held that a statute which authorized the Secretary to issue special use permits "under such regulations as he may make and upon such terms and conditions as he may deem proper" totally precluded judicial review of this discretionary function.

³²²Section 706(2)(A) also refers to action which is "otherwise not in accordance with law," but this phrase is not related to review of discretionary action; rather it relates to review of questions of law. See *Independent Meat Packers Ass'n v. Butz*, 526 F.2d 228, 238 n.26 (8th Cir. 1975), *cert. denied*, 424 U.S. 966 (1976). See also Chap. V.E.3.b., *supra*.

³²³*Bell Lines, Inc. v. United States*, 306 F. Supp. 209 (1969).

³²⁴401 U.S. 402 (1971).

³²⁵*Id.* at 416. The *Overton Park* rule for the standard of review of discretionary action should not be confused with the "clearly erroneous" test of Rule 52(a) of the Federal Rules of Procedure. That standard of review is to be applied by the appellate court only in reviewing fact findings of the district court. "The findings of an administrative agency are not to be tested by Rule 52(a)." *Montana-Dakota Utilities Co. v. F.P.C.*, 169 F.2d 392 (8th Cir. 1948). Indeed, unlike the arbitrary and capricious standard, the Rule 52(a) clearly erroneous test permits a court to substitute its judgment for that of the trial court and upset findings that are not unreasonable. *Ethyl Corp. v. E.P.A.*, 541 F.2d 1 (D.C. Cir.), *cert. denied*, 426 U.S. 941 (1976).

³²⁶401 U.S. at 416.

³²⁷*Id.* at 415.

³²⁸*Id.*

³²⁹*Id.*

³³⁰*Id.* at 416.

³³¹*First Girl, Inc. v. Regional Manpower Administration*, U.S. Dept. of Labor, 499 F.2d 122 (7th Cir. 1974).

³³²See Chap. V.E.4., *infra*. See also Chap. V.D.1., *supra*.

³³³See Chap. V.E.3., *infra*.

³³⁴*F.C.C. v. National Citizens Committee for Broadcasting*, ___ U.S. ___, 98 S. Ct. 2096 (1978).

³³⁵*National Nutritional Foods Ass'n v. Weinberger*, 512 F.2d 688 (2d Cir.), *cert. denied*, 423 U.S. 827 (1975). See also Chap. V.E.4., *infra*.

³³⁶*Ethyl Corp. v. E.P.A.*, 541 F.2d at 35 n.74.

³³⁷406 U.S. 742, 749 (1972).

³³⁸5 U.S.C. § 706(2)(C) (1976).

³³⁹See Chap. V.E.3., *supra*.

³⁴⁰*Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415 (1971). See Chap. V.E.3., *supra*.

³⁴¹5 U.S.C. § 706(2)(D) (1976).

³⁴²See Chap. V.C. (procedures for informal rulemaking) and D. (procedures for formal rulemaking and adjudication), *supra*.

³⁴³See Chap. V.E.3., *supra*.

³⁴⁴See Chap. V.E., *infra*.

³⁴⁵5 U.S.C. § 706(2)(E) (1976).

³⁴⁶See Chap. V.E.6., *infra*.

³⁴⁷*Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 412, 414-15 (1971); *Boating Industry Ass'n v. Boyd*, 409 F.2d 408 (7th Cir. 1969).

³⁴⁸*Id.*; *National Nutritional Foods Ass'n v. Weinberger*, 512 F.2d 688 (2d Cir.), *cert.*

denied, 423 U.S. 827 (1975).

³⁴⁹Watson v. Gulf Stevedore Corp., 400 F.2d 649 (5th Cir. 1968), cert. denied, 394 U.S. 976 (1969).

³⁵⁰John W. McGrath Corp. v. Hughes, 264 F.2d 314 (2d Cir.), cert. denied, 360 U.S. 931 (1959). Accord, Barry v. United States, 515 F.2d 1383, 1391 (Ct. of Claims 1975).

³⁵¹Jones v. Priebe, 489 F.2d 709 (6th Cir. 1973); Watson v. Gulf Stevedore Corp., 400 F.2d 649 (5th Cir. 1968), cert. denied, 394 U.S. 976 (1969).

³⁵²Daniel v. Gardener, 404 F.2d 889 (4th Cir. 1968); N.L.R.B. v. Arkansas Grain Corp., 392 F.2d 161 (8th Cir. 1968).

³⁵³5 U.S.C. § 706(2)(F) (1976).

³⁵⁴401 U.S. 402 (1971).

³⁵⁵Id. at 415.

³⁵⁶515 F.2d 1383 (Ct. of Claims 1975).

³⁵⁷496 F.2d 885 (7th Cir. 1973).

³⁵⁸For a related discussion, see Chap. V.E.6., infra.

³⁵⁹See Independent Meat Packers Ass'n v. Butz, 526 F.2d 228 (8th Cir. 1975).

³⁶⁰See Chap. V.B.2., supra.

³⁶¹See Chap. V.B.1., supra.

³⁶²Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971); National Nutritional Foods Ass'n v. Weinberger, 512 F.2d 688 (2d Cir.), cert. denied, 423 U.S. 827 (1975). See Chap. V.E.3., supra.

³⁶³See Chap. V.E.3., supra.

³⁶⁴Id.

³⁶⁵Id.

³⁶⁶See Chap. V.B.1. and 3., supra.

³⁶⁷Id.

³⁶⁸See Chap. V.E.3., supra.

³⁶⁹Id.

³⁷⁰See Chap. V.E.4., supra.

³⁷¹Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971). See Chap. V.E.3., supra.

³⁷²See Chap. V.E.3., supra.

³⁷³Compare Chap. V.E.3., supra.

³⁷⁴5 U.S.C. § 706 (1976).

³⁷⁵See 5 U.S.C. § 533(c) (1976), discussed in Chap. V.C.1., supra.

³⁷⁶Id.

³⁷⁷Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., ___ U.S. ___, 98 S. Ct. 1197 (1978); see Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971).

³⁷⁸See Chap. V.E.3., supra.

³⁷⁹Id.

³⁸⁰D.C. Federation of Civil Ass'ns v. Volpe, 459 F.2d 1231, 1237-38 (D.C. Cir. 1971), cert. denied, 405 U.S. 1030 (1972).

³⁸¹E.I. du Pont de Nemours & Co. v. Train, 541 F.2d 1018, 1026 (4th Cir. 1976), modified on other grounds, 430 U.S. 112 (1977).

³⁸²D.C. Federation of Civil Associations v. Volpe, 459 F.2d 1231 (D.C. Cir. 1971), cert. denied, 405 U.S. 1030 (1972).

³⁸³Hooker Chemicals & Plastics Corp. v. Train, 537 F.2d 620 (2d Cir. 1976); see United States v. Morgan, 313 U.S. 409, 422 (1941).

³⁸⁴Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 419-21 (1971).

³⁸⁵Id.

³⁸⁶Id. at 420.

³⁸⁷411 U.S. 138 (1973).

³⁸⁸Id. at 143. Accord, Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., ___ U.S. ___, 98 S. Ct. 1197, 1214 (1978).

³⁸⁹See discussion in Chap. V.C., supra.

³⁹⁰See Chap. V.E.3., supra.

³⁹¹See United States v. Carlo Bianchi & Co., 373 U.S. 709 (1963); Twiggs v. United States Small Business Administration, 541 F.2d 150, 152 (3d Cir. 1976); Dry Color Manufacturers Ass'n, Inc. v. Dept. of Labor, 486 F.2d 98, 104 n.8 (3d Cir. 1973).

VI. The Planning Process: A Basis for Reasoned Decisionmaking

The planning process is the method by which the multifarious requirements, both legal and professional, are satisfied. The planning perspective of those requirements, particularly the legal ones, is basically a pragmatic one. Its focal point is how to fulfill the legal requirements in a manner consistent with professional planning expertise. To the extent the law imposes limitations or constraints on planning or management decisions, it is imperative to know and understand these legal requirements and how they have been treated historically by the Forest Service in the planning process. Planners also need to recognize how the legal requirements impact the planning process and the ways that the legal and the planning objectives can be met simultaneously in the integrated planning process. The end product should be better reasoned decisions reflected through the integral forest plan and its implementation.

Planning is a process whereby resources are analyzed, goals and objectives are established, and strategies for achieving those objectives are developed. The plan serves as a rational guide for improving the quality of decisionmaking, particularly in situations where pressing and conflicting demands are made on limited natural and fiscal resources.

The Forest and Rangeland Renewable Resources Planning Act of 1974 (RPA), as amended by the National Forest Management Act of 1976 (NFMA),¹ provides substantial direction for the planning and management of the national forests and grasslands. This new statutory planning direction is unprecedented in the history of the development of United States public land policy. One of the unique features of the legislation is the requirement that an integrated forest plan be prepared for each forest or administrative unit. This "integration" requirement represents a significant departure from the manner in which national forest land management has been conducted. Any suggestion that these statutes simply codify the conventional practices at the forest and regional level does a serious disservice to the congressional objectives contained in RPA/NFMA. The Act clearly represents a totally different approach to forest land management planning; therefore, a new planning process is necessary to comply with the present law and the Forest Service's implementing regulations.

Historically, forest land management planning could best be viewed as an exercise in disjointed incremental steps or piecemeal responses to issues or problems. This description is not intended as a derogatory criticism of past efforts, but merely

an attempt to describe the past process of Forest Service planning. Over the years a variety of statutes requiring special purpose or special area planning have been enacted, and the number of required plans has increased. Prior to 1976 it was difficult to assemble the single element plans into a form that would resemble an integrated document. At best, the forest administrator and concerned public were presented with a large group of individual documents or "plans" each of which had some bearing on forest land management processes. Typically these were prepared at different times, covering different, overlapping, or adjacent geographic areas, and poorly referenced or otherwise inter-related to one another.

The complexity of a multi-resource forest can be easily likened to the complexity of an urban community system where the basis for orderly and environmentally sound development and management is best embodied in the comprehensive plan. The integrated plan, as perceived, will combine the various parts of previous plans into the statutorily required single element plan. The process of identifying and selecting land management alternatives will follow the National Environmental Policy Act (NEPA)² and Administrative Procedure Act (APA)³ requirements for federal actions. Planning procedures are set forth in the regulations and eventually should be described clearly in planning handbooks for all Forest Service land managers. In the absence of specific statutory provisions concerning the contents of "the plan," it seems imperative that "the plan" should be cast in a mold which provides a framework for incorporating all basic requirements of the applicable statutes insofar as is practicable within the plan document. This should be done as uniformly and consistently as possible.

Forest land management planners historically have apparently lacked familiarity with the statutory basis for preparing various planning documents. Existing documents combining the land management plan and the environmental assessment vary greatly in form and content. Examination of these reveals a failure to show their compliance with stated mandates or to express clearly their statutory compliance. When applying the list of approximately seventy-five federal statutes directly applicable to the management of national forest lands to many of these plans, it was extremely difficult, if not impossible, to find a direct or even casual reference to specific statutory directives. This apparent lack of familiarity with statutory authority gives an impression to persons outside the Forest Service that those preparing and implementing the forest plans are ignorant of their

* The notes for Chapter VI begin on p. 212.

comprehensive planning responsibilities. These situations are additionally alarming because simple mistakes, gross oversights, or the absence of a workable coordination device could result in, and in fact have resulted in, litigation concerning Forest Service practices and planning.

The new planning process emphasizes identifying applicable laws and stating how they are satisfied in the plan itself. One of the most critical concerns about the composition and content of the plan is that it be a self-contained document which evidences on its face compliance with statutory and planning requirements. The decisions based on it should be reasonable and acceptable both from a planning and legal point of view. This documentation aspect of the plan is especially important concerning the public information requirements of NEPA and RPA/NFMA. The plan should show that the requirements of every relevant statute have been addressed, satisfied, and coordinated to the fullest extent possible. Anything short of this showing invites litigation with attendant disruption in the planning and management of the forest resources pending resolution of the lawsuit. Much potential litigation will be avoided by a clear showing of statutory compliance to the potential litigant within the document itself.

An additional benefit of statutory documentation is to assure that the plan meets all applicable federal laws. It also helps the Forest Service establish credibility concerning its decisions, policies, and programs resulting from implementation of the plan.

This new planning process also injects a new role for lawyers. Each interdisciplinary team should be able, when necessary, to get assistance from a federal attorney familiar with federal environmental law and administrative procedure. Each plan in its early draft stage should be given close legal scrutiny. Detailed substantive questions cannot be raised in this report about technical matters pertaining to silviculture, range science, wildlife habitat, and recreation area design and management or the host of related multi-resource management activities which occur as the end product of the practice of professional forestry on NFS lands. These questions must be left to the appropriate technical experts. If future litigation is to be avoided, however, the plan must be construed as a policy document, and management activities must be construed as budget and program operations; and those have to be within the authority of the enabling statutes.

The Forest Service is obviously under close scrutiny by a number of special interest groups and organizations intimately familiar with federal law and the procedural requirements for proper compliance with these statutes. In virtually every instance of planning, plan revision or amendment, management action, and cultural treatment, these groups will examine Forest Service decisions and actions in light of these statutes. A relationship between planner and lawyer should

occur at the forest and regional level within the Forest Service similar to that which has developed in local urban land use planning and management where the planner and lawyer have become the principal working team coordinating with city councils, planning commissions, zoning boards, and the like.

Because of the sheer magnitude and complexity of applicable statutes and their analysis, resource planners must achieve a level of legal and policy concern which previously was not necessary. That task can be simplified by assigning a resource attorney to each forest staff. That attorney would be the principal staff person providing legal counsel at every stage of plan preparation, public review, and implementation. The lawyer could assist in the drafting of specific language in the plan as well as in analyzing the legality of the plan alternatives, environmental analyses, and specific permit applications. An attorney could help with informal resolution of conflicts among competing interests and user groups which often occur at the forest level.

A. ROLE OF LAW IN FOREST SERVICE LAND MANAGEMENT PLANNING⁴

The Constitution, Congress, and the power of the executive branch through its rulemaking activities constitute the source of authority for planning and managing the national forests and grasslands. The various resource-related laws and regulations may constitute constraints or management opportunities for the use of forest land resources. Consequently, these statutory and administrative constraints and limitations must be considered in the planning process and specifically articulated in the forest plan document since they may well be just as significant to the eventual management determination. Therefore, a critical first step in the planning process should be to define all the constraints to accomplishing multiple-use objectives including the legal constraints specifically applicable to each resource or each geographic area of the forest.

Congress usually enacts descriptive rather than prescriptive legislation. A broad statutory directive is intended to allow the administrative agency to use its rulemaking authority to fashion an action program according to a detailed set of regulations. These regulations, such as the regulations to guide implementation of RPA/NFMA, provide the vehicle for developing the parameters for preparing the standards, criteria, and guidelines for planning and management activities.

To meet the requirements of MUSY under RPA/NFMA, for example, specific planning standards for each resource use and activity must be adopted and used. Standards for evaluating lands under multiple-use or single-use designation, as well as operational and development

standards, must be set forth in the plan. These standards serve as the basis for defending management actions if questioned by the public, special interest groups, Congress, or the courts. Application of these professionally accepted and technically defensible standards will establish a procedure whereby each use or potential use is given "due consideration" in the planning process. It is extremely important to clearly demonstrate through the planning process and the plan itself that multiple-use considerations were a part of the multi-resource analysis procedures used by the interdisciplinary team and were carefully applied to all land within the forest unit in each land management classification.

Reasonable and defensible standards should serve as the basis for determining the appropriate mix of uses within a given management area. Additionally, these planning standards and analytical steps should be communicated in a manner which makes them understandable by the lay persons and the public at large. The requirements for documentation and for public information under the provisions of NEPA and RPA/NFMA make it imperative that Forest Service resource planning decisions, as well as the background data, standards, and policies on which they are based, be clearly articulated in the plan.

In certain instances Congress has articulated prescriptive requirements in an enabling statute. The reason for this is to mandate certain activities or practices by a federal agency which are not subject to discretionary interpretations. For example, the NFMA requirement to maintain species diversity should be interpreted in a forest-wide sense.⁵ Obviously, this excludes any drastic shift away from the species composition best adapted to a particular site and requires a demonstrable effort to seek a biotic equilibrium throughout the forest unit. Intentional conversions to monocultures for strictly economic reasons must be avoided, as should the wholesale conversion from an indigenous forest type to a monoculture or other vegetative composition which severely disrupts other uses and values.

Congress uses enabling legislation as the basis for articulating a national policy or program with broad national goals and sometimes specific objectives or outcomes. It then directs the administrative branch to develop a program, which is consistent with other laws, policies, and programs to accomplish these objectives. Congress frequently establishes a timetable for compliance with target dates when specific, measurable outcomes should be accomplished.

As an example, Congress intended that the application of the multiple-use principle be consistent with the requirements of other laws. Certain statutes require commitment of specific areas of public land, including NFS lands, to single-purpose or dominant use management in contrast with the more general multiple-use concept, thereby constraining the exercise of

administrative discretion. The Wild and Scenic Rivers Act, the Wilderness Act, and the Endangered Species Act are all examples of statutes which establish lands or management practices for specific purposes by congressional mandate through either specific geographic delineation or specific stipulated functional or ecological criteria.

In conjunction with the multiple-use concept, the forest plan should clearly delineate those lands within the forest that have been preempted from multiple-use considerations as the result of specific use designation by other statutes. Wilderness lands, wild and scenic river corridors, natural areas, and specific use permit lands are examples requiring such delineation. Also, portions of a forest which fall under the provisions of statutes relating to special geographic areas or administrative situations must be delineated in the forest plan. The Coastal Zone Management Act, the Corps of Engineers Water Resource Project Act, and the Water Resources Planning Act are a few examples of the many statutes which require specific forest planning actions. The number and complexity of these statutes and regulations, whose provisions are references to the management of specific lands either by geographic designation, resource characteristics, or administrative relationship, emphasizes the need for a major section in the forest plan devoted to the specific treatment of each statutorily designated area.

Another group of statutes mandate system-wide requirements which influence the application of the multiple-use concept. The National Environmental Policy Act (NEPA) is such a statute which applies to all governmental agencies and, consequently affects Forest Service programs. Many NEPA provisions are similar to, and compatible with, those of NFMA, and the latter make specific reference to the need for coordination of forest planning with the provisions of NEPA. The provisions for complete examination of all the environmental ramifications of a project, full public disclosure of environmental information; and interdisciplinary planning combining natural and social sciences and the design arts are in complete harmony with the purposes and requirements of RPA/NFMA. Consequently, the mandates of MUSY, NEPA and RPA/NFMA should be inextricably combined in the forest planning process.

Similarly, the provisions of the APA affect the system-wide procedures of federal agencies including the Forest Service. The APA's provisions primarily relate to procedural matters in contrast with the mixed procedural and substantive matters addressed by NEPA. As with the latter, the provisions of APA are inextricably interwoven into the administrative applications of the multiple-use resource management concept in all planning, programming, budgeting, and implementing activities. Forest planners, aided by legal counsel, should familiarize themselves

with the APA. That Act must be adhered to as it applies to each step of plan preparation, approval, execution, amendment, or revision.⁶ Considering the prevailing attitude within which forest land management planning will take place--the general public's suspicion of bureaucracy and governmental administration and special interest group views of proper national resource use--it would be advisable to prepare a brief discussion in the plan of the administrative process along with a diagram or flow chart which identifies the key activities and provisions relating to all public involvement and professional participation in planning, management, and adjudicatory activities. In all probability most Forest Service personnel involved in land management planning are not familiar with the intricate provisions of administrative law.

Another role of law is in the courts through judicial review of agency actions. Congress has provided various procedures to insure that administrative agencies use their authority in an appropriate manner, doing what Congress has required or authorized. Agencies also are responsible for failing to act or for acting beyond the mandate of specific statutory authority.

The courts, in their interpretations of the Multiple-Use Sustained-Yield Act, for example, are consistent in interpreting provisions relating to the discretion of the Forest Service in the management of forests rather broadly. However, Forest Service decisions are subject to judicial review. The administrative decisions may be reviewed judicially to determine that the particular requirements of the relevant statutes, however general they may be, have been met. The courts have been consistently unwilling to arbitrate, to decide differences of opinion, between various individuals or special interest groups and the Forest Service concerning uses of a particular forest. If the decision has been made in the manner required by the relevant statutes, the determination of the Forest Service will prevail based on its judicially recognized professional expertise.

While the question of statutory priorities among resource users continues, any eventual resolution of the question would seem to have negligible effect on the total planning process. Even if timber management, or a combination of timber and watershed management, should be considered as having statutory priority, it seems quite clear that decisions made must be preceded by a complete analysis of the other potential resource uses in the unit under consideration and of the impacts on all resource uses in the unit under consideration. The primary effect of a statutory priority in the planning process would be a shift of emphasis in the specific resource allocation at the end of the process. The mandate for detailed, knowledgeable resource inventory and for systematic analysis would remain unchanged.

B. PLANNING - THE LEGAL PERSPECTIVE

A forest planner thoroughly or even casually familiar with the planning sheets of Volume I should garnish some awareness of the need for at least minimum statutory compliance in the preparation and implementation of an integrated forest land management plan. The message to forest planners in clear terms is that there must be strict adherence to the statutory performance standards for every statute which is applicable to a specific issue or management situation. Throughout the planning process, including every step from issue identification to selection and implementation of the selected management alternative, there must be strict adherence to procedural matters set forth in all applicable federal statutes. Procedural defects are easy targets for litigation and open the door to the courts to fashion procedures and requirements as part of the remedy for a particular error or omission.

Planners must learn and appreciate the role of law as it provides a basis for logical, well reasoned decisionmaking which occurs through the planning process. Statutes such as the Wilderness Act or Wild and Scenic Rivers Act authorize agencies to undertake specific analysis process, apply criteria and standards, make resource allocation decisions, and implement management and monitoring programs. Congress in drafting legislation relies on planning studies, agency input, and strategies and procedures suggested by a variety of interested parties. In many instances the framework for a planning process is embodied in the enabling legislation.

To the fullest extent possible the plan document should contain clearly visible evidence of compliance with the applicable statutes which have bearing on the selection of an alternative and subsequent management decisions. Plan elements should be identified according to their reference to specific statutes, such as the Wilderness Act, the Endangered Species Act, or the Clean Air Act. Where a specific element or chapter in the plan is not appropriate, then a footnote should be used to reference an action, consideration, evaluation, or denial based on a specific statute, groups of statutes, regulations, executive order, or policy directive. The source of authority should be clearly articulated for any planning procedure, action, or decision flowing from the planning process.

In addition, the law requires complete and accurate recordkeeping throughout each step of the decisionmaking process. Many agency actions have been terminated or substantially altered as a result of litigation which revealed gaps in agency recordkeeping procedures involving a challenged decision.

Recordkeeping, as understood in the legal context, involves a systematic procedure for recording, compiling, and making available to all interested parties relevant information. It includes: transcripts of all hearings, meetings, special workshops, work sessions, conference calls, and similar functions. The record also embraces annotated work notes involving decisions, actions, and considerations of the planner, planning staff, or interdisciplinary team throughout every step of the planning process. These can be kept through the use of log books, time records, serial memorandums, or special task reports. Records of public meetings, public hearings, survey forms, cards, letters, office visits, telephone calls, telegrams, and the like should be made a part of the permanent plan record. Compiling this information in an appendix would assure that the record would be a part of the plan document. Internal information involving minor staff decisions is not considered critical to the decisionmaking process unless these actions hinder the formulation of reasonable alternatives.

The permanent record should show each statute considered in the course of alternative selection and decisionmaking. The information should clearly display how statutory compliance was achieved, specific issues and problems identified, and how these issues and problems were resolved through the planning process.

The planning process, as set forth in the guidelines for land and resource management planning in the NFS, requires a ten-step planning process for the preparation of the integrated forest land management plan. The guidelines are specific in terms of how forest planners should go about selecting a reasonable range of alternatives, how these alternatives should be evaluated, and how the selection of a plan alternative should be made. Planning criteria to guide the process are to be developed by the interdisciplinary team at the beginning of the planning process. Resource management standards and guidelines for each resource system are detailed in the planning guidelines.

The permanent record should display a road map of the decisionmaking process according to the applicable law and rules, orders, and policies. Consideration of all relevant facts is required. The procedure for gathering and considering the relevant factual material in light of the applicable law must be clearly documented. All evidence gathered or presented, in any form, must be made a part of this record and should be readily available to any person desiring to study the plan and management program.

Planners often become so involved in the process to prepare a plan document that the product becomes the most important end of itself. As the agency pressure increases to step up activity to meet the statutory deadline of 1983 for full compliance with RPA/NFMA, forest level planners should guard against the temptation to take what appear at the moment to be expedient shortcuts in record-

keeping and careful documentation of statutory requirements as these requirements directly pertain to the issues, problems, and management practices under consideration in the planning process. The record must show that every required step was taken to find all available information required by law to bear upon the selection of the plan alternatives and decisionmaking process. Public interest groups, industry planners, and industry groups, either opposing Forest Service activities or attempting to strengthen a Forest Service position favorable to their point of view, will gather every available bit of information, including provisions of the law, they can use to strengthen their case. If for no other reason than to avoid embarrassment, the forest planner should be careful to see that the planning staff is diligent in the fact finding and recordkeeping activities which underlie the planning process.

C. PLANNING INTERPRETATIONS DRAWN FROM KEY STATUTES AFFECTING FOREST LAND MANAGEMENT PLANNING

This material consists of comments dealing with a planner's interpretation of those key statutes given in-depth analysis in the preceding chapters. The questions, observations, and suggestions herein represent an intuitive as well as technical approach to each statute as it relates to the composition of the integrated forest land management plan.

1. Land Ownership--Real Estate Management

Federal statutes and policies governing the acquisition, disposition, exchange, and private use of national forest land have been thoroughly analyzed. From a planning perspective this analysis suggests a plan element which addresses the real estate management portion of the land management program.

The land ownership element should contain information on all parcels of land within the forest boundary which are subject to any of the real estate statutes or policies. Because of the federal authority for acquiring certain types of land, disposing of federal lands, and exchanging federal land for private lands outside the federal boundary, several sets of overlay maps with accompanying statistical and narrative information should be prepared. Some of this information will appear redundant, for example, with information mapped in the geology/minerals element, recreation inventory maps, transportation/communications element, and in some instances the water resources element. This should not be a problem because the interpretations and applications of these overlay maps will be for other purposes.

Working from a forest base map an overlay predicting each of the following land categories should be prepared:

- (a) All private holdings within the forest boundary showing current owner, route of ingress and egress, and land use.
- (b) All active mining claims, permits and/or patents, showing access roads and any other required land commitments or allocations.
- (c) All land under special use permit, by category, with all access roads, corridors, utilities, etc., clearly shown.
- (d) All lands within a forest boundary, which meet the criteria of one or more authorities, that could be considered for future acquisition of land exchange.
- (e) All lands outside the federal boundary which have been studied as potential candidates for either fee simple acquisition or exchange.
- (f) All military use or any other special use lands within the federal boundary.
- (g) Lands within the federal boundary which meet statutory criteria for withdrawals.
- (h) Lands within the federal boundary which meet statutory criteria for sales or transfer to local jurisdictions for town sites or other statutorily prescribed uses for such lands.
- (i) Land areas, which from a land capability determination, are to be considered for potential utility transmission or transportation corridors through the national forest.

Information on exact acreages for each category as well as the statutory standards governing that category should be stated in clear language as part of the narrative so as to easily document statutory compliance for any proposed action involving federal real estate.

2. Timber Management

Treatment of timber management should be a major element of the plan. Two key requirements must be met in this element: (a) the timber management elements must deal head-on with the requirement to provide for and maintain species diversity, and (b) the preparation of harvesting and planting schedules must demonstrate that the concept of non-declining even-flow has been strictly adhered to.

In areas of a forest where timber management is to be the dominant use consideration, the land suitability analysis should establish the ecological basis for this determination. Economic and social considerations should be thoroughly analyzed. Compatible uses and activities should be analyzed so that an analysis of each resource system can be made under various levels of management.

NFMA requires comprehensive treatment of the silvicultural systems to be applied to each timber management activity. The silvicultural systems should be graphically illustrated to show how the harvest and land treatment program will appear on the ground. Logging strategies selected for consideration should be clearly illustrated. All multiple use situations should be carefully displayed. The selection of the silvicultural system with all pertinent research findings dealing with the forest cover type, site considerations, and regeneration procedures should be discussed, with a technical appendix if necessary. No silvicultural prescription should be suggested or prepared until the timber staff is completely knowledgeable and able to articulate the full range of short-term and long-term implications associated with the proposed stand treatment.

The most significant departure from past procedure appears in the area of forest transportation system planning. Section 10(a) of NFMA states:

The Congress declares that the installation of a proper system of transportation to service the National Forest System, as provided for in [16 U.S.C. §§ 532-38] shall be carried forward in time to meet anticipated needs on an economical and environmentally sound basis, and the method chosen for financing the construction and maintenance of the transportation system should be such as to enhance local, regional, and national benefits, except that the financing of forest development roads as authorized by clause (2) of [section 4 of the Act of October 13, 1964] shall be deemed "budget authority" and "budget outlays" as those terms are defined in section 3(a) [of the Congressional Budget and Impoundment Control Act of 1974] and shall be effective for any fiscal year only in the manner required for new spending authority as specified by section 401(a) [of the Act].⁷

The Act further requires the preparation of a transportation element of the integrated plan which designates those segments of the forest road system which are to be permanent roads. Permanent roads will not, as was the case in the past, be financed with timber receipts. Any road constructed primarily for timber management or any other permit or lease must now be designed so that the road may be revegetated within ten years following completion of the resource development activity. If at such time a portion of nonpermanent road is designated as a link within the National Forest Transportation System, the road may then be built to standards appropriate for the intended use.

The timber element should be closely interfaced with the transportation element. A forest-wide transportation analysis should be

prepared as an element of the integrated land management plan. Forest roads and related facilities required to support timber harvesting and multiple-use management should be designed as a component of this element in accordance with section 10 of NFMA.

3. Water Resource Management

Forest Service planning and management of water resources are influenced by several statutes. A high degree of planning coordination with other state and federal agencies is required due to the area-extensive and ambient nature of water resources as reflected in the following statutes.

- (a) Flood Control Act of 1936, as amended; the Watershed Protection and Flood Prevention Act of 1954; and the Water Resources Planning Act of 1965

Between them, these statutes provide direction for Forest Service involvement in comprehensive watershed and river basin planning for all potential water resource uses when one or more portions of a national forest fall within such a designated planning unit. These planning units may, and often are, multi-state in size.

The statutes provide direction for Forest Service involvement as an agency planning team member in large-scale river basin planning activities. These Acts require Forest Service input in policy formulation as well as resource management where Forest Service activities affect basin-wide social, economic, and environmental goals and development programs and specifically require consideration of non-structural alternatives to the prevention of flood damage.

Where situations requiring Forest Service participation occur, the involvement should be treated in a separate section of the forest plan. The basic planning jurisdiction or the watershed unit should be delineated on a separate map with all political jurisdictions properly identified. Forest Service input usually involves participation in numerous conferences and meetings. A staff planner may have to be assigned this area of work. Complete records should be kept on every aspect of this involvement, particularly to the extent that events occurring as a result of this involvement would have bearing on any Forest Service decisionmaking as part of the land management process. The plan should clearly delineate the statutory requirements and limits on Forest Service participation in river basin or watershed programs.

- (b) The Corps of Engineers Water Resource Project Act of 1944, as amended, and the Federal Water Project Recreation Act of 1965, as amended

These two Acts, although not dealing directly with Forest Service planning and management, contain provisions that must be considered by the Forest Service in its development of recreational facilities at federal water projects. The Forest Service must be aware of the applicable provisions in the Acts which provide for interaction between the Forest Service and other federal agencies in constructing, maintaining, and operating recreation areas and facilities at federal water projects. Also, the Forest Service must establish user fees at such recreation areas pursuant to the guidelines promulgated under the Land and Water Conservation Fund Act of 1965. Finally, the Forest Service is authorized to assume management of federal water project areas developed for recreation purposes if such control is in the best public interest. Additionally, if any such subject is wholly within a national forest, the Forest Service must assume the responsibility for the operation and maintenance of the recreation area.

The Corps of Engineers Water Resources Project Act was enacted primarily to continue the national flood control policy initiated by the Flood Control Act of 1936, as amended by subsequent acts of Congress. However, a provision of the Act focuses on the use of water resource development projects for park and recreation purposes and relates to Forest Service administration. The Act does not specify a uniform system to be used as a guideline for the coordination of activities between federal interests in the administration of a water project and involved non-federal interests. A major purpose of the Federal Water Project Recreation Act of 1965 was to coordinate federal water resource projects with needed recreation facilities and fish and wildlife protection by providing standard policies and procedures relating to cost allocation, reimbursement, and cost-sharing between the federal and non-federal interests. Note that projects within the boundaries of a national forest are to be administered by the Forest Service.

Planning requirements under these Act pertain to instances where the Forest Service would become involved in the planning, construction, and maintenance of a federally funded water resource development project. This could involve such procedures as a procurement of a Federal Energy Regulatory Commission license and the leasing of land by the Secretary of Agriculture. Most frequently, the Forest Service finds itself in a joint venture with a state water development agency or the Defense Department through the Army Corps of Engineers to plan and develop water-oriented recreation facilities. Usually, the state agency or Corps develops the water project, and the Forest Service plans and develops recreational facilities on shoreland on a Corps or state impoundment with the national forest lands planned in conjunction with the preparation of a reservoir master plan for land resource

management. In many instances, national forest lands are managed as multiple-use lands with recreation development such as campgrounds and picnic areas within the immediate shoreline management zone. In some instances, because of topographic features, vegetation, and the nature of the water body, the Forest Service may be required to create special use zones in order to protect shorelines or scenic vistas within sight of the water body. Forest Service and Corps of Engineers recreation and land management plans should isolate these situations and treat them as special land planning and management problems, with appropriate reference to the controlling authorities.

Where resource development projects described by these acts take place within the area of Forest Service jurisdiction, the special provisions relating to administrative relationships between the Secretary of Agriculture, the Secretary of Interior, and the Department of Defense should be noted in the administrative proposals for those facilities in the forest plan. The administrative provisions of these Acts must be consolidated with the provisions of the Land and Water Conservation Fund Act regarding the question of user fees.

- (c) The Federal Water Pollution Control Act of 1972 and the Clean Water Act of 1977

Planning activity in response to these statutes involves for the most part strict compliance with the statutory requirements for projects which occur in the field. These management activities are treated at the operational or technical level of planning.

As part of the hydrology/water element of the plan a separate section, including the appropriate maps, should be prepared. Specific water quality standards involving proposed resource management activities apply to the treatment of wetlands, floodplains, and water courses. Based on the criteria for guiding the installation and operation of point-source pollutants special areas best suited for these kinds of forest products or forest use activities could be located on a separate overlay map. Timber harvest, mining, road construction, and the development of recreational facilities fit into these categories. Silvicultural and other vegetative treatments are classified as non-point sources and as such must be planned according to the statutory criteria and the appropriate EPA regulations.

It would be desirable to consider the preparation of the equivalent of a section 208 water quality element for the forest land management plan. This would clearly illustrate the statutory compliance program developed at the forest level for each resource extraction and management activity. A key consideration in this element should be the presentation of mitigation strategies for preventing or reducing water quality deterioration which could occur during various phases of field

activity such as the development of a winter sports complex or the construction of utility transmission facilities.

4. Soils

Each forest should have a soil survey prepared which includes both soil association and soil series information and interpretations. A soil survey report can be prepared through a joint agreement with the Soil Conservation Service.

Soils information is an essential data element in all land classification activities as well as the formulation of alternatives, selection and assessment of alternatives, analysis of carrying capacity, and the formulation of operational or technical plans. It is impossible to prepare a scientifically sound EIS without in-depth soils information.

Collection of soils information on an issue-response basis is not a strategy that leads to sound land management decisions based on land capability analysis. A wise strategy would be to seek funding to provide a forest-wide soil survey prior to any land capability analysis. Soils' related constraints which could pose problems for certain land uses could be mapped and interpreted so that the appropriate land management strategies could be prepared.

5. Minerals

Mining statutes as applicable to mineral activities on national forest lands are reported in Volume I. Review of these statutes indicates that the principal Forest Service responsibility involves management of mining operations through enforcement of appropriate regulations, which include restoration of the land, curtailment of erosion, and revegetation.

Prior to the preparation of the land capability analysis a separate mineral/geology element consisting of a mineral inventory should be prepared. The existing procedure appears to treat the mineral resource as an issue-response situation which arises when an individual or corporation discovers a mineral deposit with economic potential.

The inventory and mapping of geologic features with mineral interpretations would provide information about future land use situations and the problems of planning for access, water, power, and the treatment of residue as part of the mining and land restoration program. There are statutes and regulations governing the location of roads, pipelines, power lines, and processing facilities which require planning coordination with a host of other statutes and plan elements and processes.

The need for a mineral resource overlay with supporting empirical data on the extent of the deposit is as important as the timber survey in conjunction with the vegetative inventory and mapping, in the process of determining land capability. The Forest Service should program funds for a geologic and mineral study which could be done by the U.S. Geological Survey or private contractors. Information on the agency responsibility for dealing with mining and minerals can be found in Volume I.

6. Range Management

A separate plan element dealing with range management is advisable. All authorities dealing with those NFS lands designated for range use should be specifically reflected in this section with appropriate interrelation with the land ownership section (especially in light of the close relationship with lease provisions).

Rangeland suitability should be derived as part of the ecological analysis applied to all lands within the forest with multiple use analysis applied thereafter to determine the appropriate mix of uses and levels of use.

Granting, extending, and revoking grazing permits should be substantiated by sufficient relevant ecological inventory and assessment data. Statutory compliance in the issuance of grazing allotments should be tied to the land suitability analysis and the NEPA assessment portion of the plan.

Preliminary information for range management considerations should be derived from the vegetation inventory and analysis. Standards and guidelines for range management are in the land management planning regulations. The land capability analysis should include the basis for rangeland classification. Consideration of wildlife and other uses and impacts should occur at the alternative formulation and analysis step of the planning process.

7. Plant and Wildlife Management

Plant and wildlife management is treated in many statutes. The RPA/NFMA requirement to weigh all alternatives in terms of the impact on species diversity should be interpreted to cover all vegetation, not just the mix of tree species. From a non-commercial perspective which deals with plants and animals having non-market or non-game designations the most important statute is the Endangered Species Act as well as statutes enacted to protect or otherwise deal with a specific species.

Planning treatment of the Endangered Species Act of 1973 is extremely critical in the preparation of land capability maps and operational plans. Synthesis of single-factor resource maps, coupled with on-the-ground verification should result in

the identification of habitat niches or plant communities and the evaluation of the extent to which specific activities could encroach upon and impair the ecological integrity of the habitat, community, or individual species. Land use maps should delineate zones of critical influence when preservation or limited conservation activities should be enforced. The Forest Service may assist the Secretary of Interior to establish the list of threatened and endangered species, the habitat of which can be shown on this map. The map should show the actual or approximate location of all such species known to be within the forest jurisdiction.

Because of the complexity of this requirement, a separate plan element is recommended. In addition to special overlay maps delineating critical areas, the plan element should clearly illustrate the specific protective measures to be implemented, and how these measures comply with existing statutory authorities governing Forest Service land management activities. The element should identify and discuss all potential and existing activities which could encroach upon the species range or habitat and, if possible, what measures could be taken to permit certain land uses and cultural activities to occur in a compatible manner.

The plan element must present a specific set of management strategies for each habitat and/or species with reference to each major renewable resource management element such as minerals, water, timber, and forage. The plan should clearly show how proposed or ongoing activities, with the influence zone of an area designated as rare and/or endangered species area, will in no way jeopardize the continued existence of the species. All mitigating steps under consideration should be discussed in the plan. Recreation development and activity management, integrated with wildlife management, should be coordinated and horizontally integrated with the endangered species element to insure that no action or activity (regardless of how passive in character it may appear to be), could in any way have an impact on the habitat or species, even at the extreme outer limits of the range. If it is determined that a proposed activity is scheduled in the influence zone of a rare and/or endangered species area, the Forest Service may be required to prepare a biological assessment on the species in question.

All inventory, planning, and protection measures involving rare and endangered species should be clearly illustrated and cross-referenced with the other plan elements. A substantial scientific base relying on existing or newly initiated research should be used to footnote the management prescription for each habitat and/or species. Skeptical publics and special interest groups will no doubt keep a constant vigil on situations where rare or endangered species have been located. This documentation will serve to substantiate the proposed program measures and avoid any

criticism that management prescriptions are arbitrary and lack scientific credibility.

The plan element should clearly illustrate the ongoing efforts within the forest to initiate a continuous search for rare and/or endangered species within areas not yet brought under specific management programs. Because of the data deficiencies which exist on many forests, this continuing effort is essential to insure statutory compliance. A component of this plan element should be a special section articulating procedures to monitor species and habitats within the forest. This data should be available and incorporated into any subsequent management and program analysis.

A final word of caution: there are several special species statutes which could be incorporated into this plan element. For example, provisions of the statutes dealing with the protection of golden and bald eagles, wild and free-roaming horses and burros, and fish and wildlife coordination should be complied with in this element. Given the federal experiences with litigation based on the provisions of this Act over the past few years, it would be prudent to devote considerable attention to this particular plan element. The planner is encouraged to review the planning sheets covering environmental legislation prior to preparing this plan element and subsequent management proposals.

8. Recreation Resource Management

The key statutes and regulations which should be addressed in the recreation element of the plan are: (1) Land and Water Conservation Fund Act; (2) Executive Order 11644, as amended by Executive Order 11989; (3) Wild and Scenic Rivers Act; (4) National Trails System Act; and (5) Federal Water Project Recreation Act.

The recreation element of the plan should contain all inventory, resource assessment, statutory compliance, and resource management standards and guidelines. A separate set of overlay maps should illustrate existing and potential recreation areas, trail corridors and areas suitable for trail corridor designation, potential permittee sites such as for all-season resorts or seasonal facilities (including ski developments, shoreline lands suitable for recreational development), stream protection zones, and special use areas such as natural area sites, historic or cultural sites, or outstanding scenic vistas. Because of their statutory designation Wild and Scenic River corridors will be discussed separately.

Off-road vehicle (ORV) trails and specific use areas are distinguished from other trail designations by virtue of two executive orders. The Forest Service is authorized to invite public participation to help determine the vocation of specifically designated ORV use areas. Standards and criteria for selection of these areas are set forth in the order. Special trails can also be designated. It would be advisable in areas of

heavy ORV demand to consider a separate overlay map and selection of the element to deal with this use.

Standards for designation and management of national trails are set forth in the statute. Where appropriate a separate overlay map and section of the element should be prepared.

The principal planning response to the Land and Water Conservation Fund Act of 1965 (LWCF) as amended should be found in the land ownership, water resource, and recreation elements of the integrated land management plan. Those in holding or other suitable lands which may be acquired with LWCF funds should be identified and a priority schedule for acquisition established. The land management plan should address the issue of standards and criteria for appropriate recreational lands to be added to the national forest system. All other administrative requirements of the statute should be addressed and documented in the recreation element of the plan.

9. Wilderness

The planning responsibility associated with the Wilderness Act is the application of the statutory provisions and interpretations to the development of appropriate standards for use in the land suitability analysis. Current suitability maps must expressly delineate all potential wilderness lands, primitive areas, and RARE II lands having wilderness characteristics which need to be studied for future wilderness consideration. To be in full compliance, the wilderness standards or criteria should be applied to all lands which might meet the criteria as a means of objectively factoring out those lands which could not be considered candidates for wilderness classification. After congressional determinations of statutory wilderness lands are made, all non-wilderness lands must be integrated into the resource management program of the rest of the forest. The Act emphasizes a long-range planning posture for wilderness areas and lands having wilderness character.

The administration of wilderness areas should be addressed in the forest plan from the standpoint of the statutory analysis of mining and mineral rights within wilderness areas. Geologic and mineral analysis relative to wilderness considerations will be of crucial importance in the years ahead. It will be especially desirable to consider the impact of known or suspected hard rock, oil, or gas reserves in, and adjacent to, wilderness areas. It will be necessary to consider land management strategies which reflect a multiple-use orientation to primitive area management which can accommodate non-wilderness activities with minimal environmental impact based on reasonable performance standards.

The forest plan should articulate the administrative procedures related to easements and

general access to wilderness areas; and to the considerations of wilderness impacts related to the management of adjacent lands. Resource potential subjects to the water resource and power project exceptions to exclusive wilderness protection under the Act should be identified in the plan. The plan should designate a policy zone on the boundary of statutory wilderness areas which could serve as a buffer or transition zone. An effort should be made to identify all scenic vistas observed from within a wilderness area, map these areas (Visual Resource Element), and propose special management controls to protect the visual integrity which contributes to the recreational quality of the wilderness experience.

10. Wild and Scenic Rivers

The procedures for identifying and submitting for congressional approval, potential wild, scenic, or recreational rivers which meet statutory definition and the interim management responsibilities are similar to those for wilderness areas. The forest plan should include all of the information required in the statute for the report to Congress.

Planning activities of significance under this statute focus on the application of statutory criteria to all river systems within a forest planning area. A properly prepared plan should have soils, landform, hydrology, and vegetation information to use for delineating water feature and adjacent land characteristics. A separate map overlay should be prepared to delineate the river systems and potential zones for application of wild, scenic, and recreational river criteria. Adjacent land use should also be mapped. Statutory interface with MUSY is required in the preparation of specific land management guidelines for lands within a designated special use corridor. Any special use designation or candidate study areas identified under this statute should be delineated on a special overlay map and closely correlated with the land ownership-property management section. The Act regulates use of any federal land within the river corridor.

The statute requires specific analytical procedures. These should be clearly illustrated in this element of the integrated plan. If land acquisition, exchange, or other actions are required to comply with the statute, these lands should be shown on the corridor overlay and interrelated with the lands section of the plan. The land management element of the wild and scenic river proposal, which includes any non-federal role if such exists, should be clear. The element should list all applicable management authorities, sources of funds for land acquisitions and procedures for inter-agency coordination.

Planning and management activities for the river corridors under consideration must meet the criteria in the statute and must be coordinated with those deriving from other water resource management statutes. The Wild and Scenic Rivers

Act specifically mentions coordination with planning for the same river under the Water Resources Planning Act. The proposed report to Congress must be circulated to the parties stipulated in the statute for review, thereby putting a premium on prior coordination with them. All statutory criteria for management of lands within the corridor of each category of river should be displayed in the element in such a way as to illustrate clearly statutory compliance through the management program.

11. Historic Preservation

The principal statutes with which the Forest Service must comply have been analyzed in the previous chapters. For planning purposes a plan element addressing the inventory, mapping, analysis, and management strategies for historical and cultural resources located on national forest lands is suggested. Depending on the nature of the resource and the land area involved, a separate overlay map delineating an influence or protection zone where limited activity would occur is suggested. A special inventory, documentation, and monitoring program for the various kinds of resources could be incorporated in this plan element. This information is critical to the initial analysis of a proposed activity as required by the NEPA regulations.

If a cultural resource is discovered in the course of a management activity, such as road construction, timber harvesting, or mining, special action must be initiated to assure proper inventory, documentation, preservation, and protection of the resource.

This element should identify resources which are possible candidates for protection under the Antiquities Act or which could qualify for nomination for placement on the National Register of Historic Places.

12. Transportation and Communication Systems

The interrelationship between land uses and transportation demands, and the consequential need for coordinated transportation-land use planning, have been long recognized in the urban-regional planning context. The relationships are just as prevalent in the forest resource planning context. Of special importance is the integral relationship between land development and transportation facility development: more intensive uses of land generate greater traffic demands; greater demands require improved roads; improved roads make adjacent lands more accessible, and, therefore, more desirable for intensive development; and that development generates greater traffic demands.

The transportation and communications system elements of the plan represent one of the areas

where both intergovernmental and intragovernmental coordination are of extreme importance. The plans and programs of other local, state, and federal agencies with respect to the development of transportation systems and the development of land uses with their direct effects on forest transportation systems make it absolutely essential that the intentions, estimates, projections, etc., of other planning and administrative agencies be well incorporated into the projections for the needs and scheduled development of the transportation systems through the forest.

Whether transportation systems and communication systems are considered simultaneously or individually is immaterial as long as it is recognized that they are closely related in many respects. Many communication systems are lineal in character and have network patterns criss-crossing other land uses similar to transportation systems. Additionally, there are often unique physical and environmental problems where these systems intersect each other and where they intersect particular natural features with high scenic values such as streams, gorges, and mountain ridges. Quite often communication systems contain facilities which must be served by vehicular access and, therefore, are linked to transportation systems. Finally, a pattern of substitution of communications for transportation of physical objects has been documented by planners in this area. It is speculated that increased costs, especially energy costs, for the physical movement of goods and persons will result in an accelerated substitution of electronic communications for physical transport. The statutes relative to planning these facilities fall into two major groups: (a) those which relate to specifically transportation facility planning development; and (b) those general land management statutes and regulations which relate to the granting of easements for rights-of-way, service access, etc., regardless of the particular communication or transportation system for which the easement is described.

Transportation planning is one of the oldest areas of professional planning concern and, consequently, has developed a substantial body of accepted procedure for projecting future needs based on origin and destination studies, scheduling for demand factors, transportation hardware, and land use relationships. It is important that the transportation element of the forest plan prepared by the Forest Service reflect the current state-of-the-art of transportation and communication system planning.

As mentioned in the previous material, it was assumed that owners of private lands initially within the NFS possessed a statutory right of ingress and egress. When this belief was altered by the Attorney General's opinion in 1962,⁸ negotiations with private owners began; private use of forest roads was conditioned on exchanges of rights with private owners who held property over which the national forest road system needed to be extended. Due to difficulties in negotiating

permanent rights-of-way with private property owners, the Congress passed the National Road and Trail System Act of 1964, and the Forest Service promulgated regulations in conformance with that Act. Due to difficulties experienced in the financial methods used for constructing forest roads under this Act, procedures were substantially changed under the requirements of NFMA in 1976. The plan element dealing with transportation system development should outline the methods of financing the proposed development of the system in accordance with the NFMA provisions and the new regulations.

This element of the plan should emphasize the need for the forest plan to consider the functional relationships between the lands of the forest, the lands of private interests adjacent to and within the forest boundary, and the planning and development programs of other federal, state, and local governmental units. This need is highlighted in transportation planning by the regulations to fully use the resources on national forest and private lands, and by the mandate to consider the impact of section 4(f) of the Department of Transportation Act of 1966 (DOTA) as amended, to the extent that the forest transportation system is connected with the Federal-aid Highway System.

Under the provisions of section 4(f), the beauty and value of federal, state, and local parklands and historic sites are to be protected in the process of developing highways under the Federal-aid Highway Act. Therefore, the transportation element of the forest plan must conform to the regulations regarding the consideration of alternative routes where such sites are involved. Certain, but not all, NFS lands will qualify for this consideration. It is important to note that, in the 1968 amendment to section 4(f), Congress recognized that there must be a balancing of other high priority interests with the importance of protecting and preserving parks and recreation areas. Any Forest Service determination that lands under its jurisdiction have significance and therefore may not be used for highways must be based on specific data from the inventory and the consequential plan proposals relative to recreation area development and historic sites within the forest. The discussion of court decisions relative to DOTA indicates the parameters within which the Forest Service must make its determination of significance.

The provisions of the National Trails System Act of 1968 established a national system of recreation and scenic trails. Wherever recreation, scenic, historic, or connecting trails of this national system occur within a national forest, they should be included in the transportation planning element discussion as well as in the recreation planning element discussions of the forest land management plan. Development of trail systems under this Act should be based on similar data requirements and projections as other transportation systems networks in addition

to being based on the unique recreational, scenic, and historic factors which relate to them.

Wherever the real estate management problems associated with transportation or communication system development occur, the transportation element of the forest plan should be coordinated with the land ownership-real estate management element of the plan. The transportation element should specifically describe such problems as easement, access, and right-of-way associated with each transportation or communication system and specifically program the resolution of each problem.

This element of the plan (1) must be based on accurate data of the existing land use and transportation systems both in the forest and in the surrounding region; (2) must be based on accurate projections of future demands and land use changes according to the current state-of-the-art in transportation planning; (3) must develop a system of multiple-use roads in conjunction with the sustained-yield multiple-resource management concept of RPA/NFMA; (4) must be designed to standards appropriate to the anticipated uses in the interest of safety, transportation costs, and the environmental, economic, and social impacts on adjacent lands resources and communities; and (5) must include a discussion of the appropriate funding devices balancing the use of appropriated funds with use of the "timber-purchaser" construction method. This planning process must distinguish between permanent roads and temporary roads with all temporary roads designed so that vegetative cover may be established within ten years after discontinuing their use.

It is important to note that the fiscal year budgetary process in effect creates an annual review of the transportation system "program of work." This is one specific example of the need for annual review of the forest plan in contrast with the statutory language of RPA/NFMA calling for the 10-year updating of the Renewable Resource Assessment and the five-year updating of the Renewable Resource Program and the land and resource management plans in conjunction therewith.

13. Air Quality Management

Planning activities required to assure compliance with the Clean Air Act Amendments of 1977 require the Forest Service to respond to the following situations:

- (a) actions which contribute to the prevention of significant deterioration of air quality in pristine areas;
- (b) the requirement to obtain a state permit for any direct activity which limits pollutants;
- (c) the development of a planning and management program governing the development of new or modified sources of air pollution in non-attainment areas;

(d) development of planning and management strategies to govern the permitting process for activities and/or facilities which constitute indirect sources.

The air quality management response should be prepared as a separate element in the integrated forest land management plan. Key values to be considered, which relate to a host of multi-resource management activities and mixes of uses, included such variables as aesthetic values, recreational values, vegetation, fauna, aquatic life, geological features, and human health.

Under criteria in the statute certain lands within a national forest could fall into Class I or Class II designation. Class I areas include: international parks; national wilderness areas greater than 5,000 acres; national memorial parks greater than 5,000 acres; and national parks greater than 6,000 acres. These areas by law can never be redesignated to Class II or lower standard areas. Class II areas are those designations which, if a state wishes, under certain conditions may be redesignated as Class I areas. These include: national monuments; national primitive areas; national preserves; national recreation areas; national wild and scenic rivers; national wildlife refuges; national lakeshore or seashore; and new national parks or wilderness areas in excess of 10,000 acres.

The burden of justifying a redesignation falls upon the state where the initial action is begun.

From a planning and analysis perspective the Class I and Class II areas should be mapped as an overlay map on the forest land suitability map. A second level overlay should map all major land uses and existing and potential emission sources within 50 kilometers from the forest boundary. A third overlay in this series should be an airshed map which details the principal upper air movement paths across the forest area. All emission sources "down draft" in each flow path should be identified. A fourth map should display air quality analysis in a manner similar to a weather radar map or with the most current air quality mapping techniques.

Agency procedures for compliance with respect to its own planning activities or in response to state actions involving permit requests on private land are detailed in the statute. A road map of required agency planning or assessment response activities should be prepared and placed in the introduction of the element. In this situation there are many critical activities which must be performed for virtually every major planning and management activity with the forest. The statutory analysis presents each procedure requirement in clear, concise terms.

The Forest Service (federal land manager) has affirmative responsibility to manage and protect

air quality related values including visibility within and adjacent to all Class I areas. The Forest Service must determine if any new source will have an adverse impact on such values. Impacts such as smog, acid rain, vegetative damage, odor, geologic erosion, discoloration, or related impact on historical structures are examples of the potential air drift kinds of impacts on Class I areas. Also the agency is charged with devising procedures to remedy past visibility impairment.

The plan should identify areas where visibility is an important value. Strategies for providing solutions to visibility protection should be presented. The forest must undertake an air quality impact analysis on each land management activity and planning decision which could result in air quality deterioration in Class I areas.

The Forest Service is responsible for the discharge of any pollutants from activities taking place on federal lands. A discharge permit must be obtained from state and/or local authorities. Therefore the plan should address this requirement and identify all possible activities for which a permit would be required.

The Act requires specific action involving transportation planning and the air quality transportation consequences. This planning response should be correlated with the transportation element of the integrated land management plan. Thus any proposed activity which could lead to an increase in the number of motor vehicles and related traffic should be analyzed according to the statutory criteria.

The Forest Service has direct responsibility in the planning and permit issuance for activities and/or developments which constitute indirect sources. Large scale facilities and resort developments which involve hotels, clusters of condominiums, parking lots, highways, airports, and the like create serious air quality problems, particularly in known air pollution catchment basins. The type of planning in effect for the Vail-Beaver Creek resort development on the White River National Forest is a good example of an acceptable planning and management response to this type of situation.

In essence the major planning activities necessary to respond to the Clean Air Act Amendments involve: area and regional planning involvements; analysis of peripheral activities in terms of air quality impacts on Class I areas, particularly visibility; technical capability for airshed analysis and air quality inventory and monitoring; procedures for interacting with state and local agencies and the EPA to provide appropriate input to the air quality management programs; capability to determine in a scientific manner the negative air quality implications of forest management activities; capability to be able to justify redesignations from Class II to Class I areas where appropriate; and development

and implementation of air quality monitoring programs particularly for those areas which require special attention. The Forest Service has the benefit of securing research input and technical guidance from the corps of atmospheric scientists working at various Forest Service experiment stations and as cooperators at major universities throughout the country. It would be desirable to prepare a technical handbook dealing with the preparation of the air quality element of the plan.

14. Noise Control

Compliance with the Noise Control Act of 1972 can be accomplished through restrictions on noise-generating activities and the utilization of decibel zoning where appropriate in critical areas. Noise control zoning maps for specific forest areas may need to be prepared as overlays to correlate with specific management policies. These zones will be extremely critical for all motorized noise sources, including forms of motor-powered vehicles and equipment: terrestrial, marine, and aircraft. Decibel monitoring should be carried out on a continuous basis.

Since many highways within national forests pass through linkages, the Forest Service will be required to work closely with the states and the federal Department of Transportation to develop appropriate noise control strategies. In some forests it may be necessary to coordinate with the Federal Aviation Administration to revise aviation maps, particularly for non-commercial and military aircraft where special flight control zones may be necessary to minimize undesirable aircraft noise in critical areas. In some situations involving wildlife, it may be necessary to ban all noise for a specific period. These concerns and other special noise-related issues should be dealt with in this plan element.

15. Coastal Zone Management

The Coastal Zone Management Act of 1972 (CZMA) requires the preparation of a comprehensive plan for guiding state and federal policy affecting development in the coastal zone. The federal role is effected through the provision of grants to the states to develop and implement coastal zone management programs. State responsibility covers a broad range of land uses including the management of renewable natural resources and the extraction of nonrenewable resources. All federal agencies with land management and/or federal program responsibility within a state coastal zone management area are bound to compliance with the state program in the state where the land or program activity is located.

Forest Service planning response to state CZMA programs can occur in three ways. First, the Forest Service, in managing its lands, is

bound by the consistency provisions of the Act. Second, the Forest Service may comment on a state program where such program would affect Forest Service land management activities. Third, the Forest Service may cooperate with a state when national forest lands are part of or adjacent to an area proposed by a state for an estuarine sanctuary.

In terms of the integrated forest land management plan a separate plan element or section should be prepared for each forest having lands within a state coastal zone management area. The Forest Service must identify those activities which will occur within the coastal zone management area and notify the designated state agency whenever a significant effect is anticipated. The criteria for determining what constitutes a significant effect are contained in the statute.

The CZMA provisions can be complied with in a comprehensive manner if treated as planning map overlay for those lands and activities within the zone. The criteria can be laid over the zone in a manner similar to the floating zone and be brought down upon the lands to apply to all management activities and associated influences. A planning linkage should be established with the state agency or office with administrative responsibility for coastal zone management.

It appears, from review of some coastal zone plans, that the preponderance of concerns within the coastal zone deal with visual integrity, recreation and tourism developments, transportation, urban development, industrial complexes, communications, mineral extraction and processing, forestry, agriculture and commercial conservancy types of wildlife management, and critical areas such as wetlands, bays, and estuaries. Forest Service integrated land management planning should clearly display the land management options and strategies in terms of their relationship to state and local planning activities, and where other federal lands such as military lands, national park service lands, or wildlife refuges are within the zone, the Forest Service should coordinate planning with these agencies.

There is an opportunity for the Forest Service to cooperate with the coastal states in developing estuarine sanctuaries. This cooperation should be handled on an individual forest basis as the situation dictates.

The procedural role for the Forest Service is detailed in the statutory analysis. A planning chart illustrates this role should be placed in the introductory portion of the coastal zone section.

16. Visual Resource Management

Consideration of the visual impact of forest management has emerged as a major concern in the preparation of any proposed land management program. Aside from any agency sensitivities to the

visual integrity of the forest as a unit and not just recreational areas, the public appears to be extremely aware of visual degradation and therefore more concerned about the probable effect of land treatment on the scenic beauty of the forest.

Statutory directives addressing consideration of scenic beauty or visual values vary considerably. Specific statutes dealing with specific purpose of recreational areas such as the Wilderness Act, Wild and Scenic Rivers Act, and the Land and Water Conservation Fund Act have preservation of scenic values as a primary purpose of the federal action. Numerous other statutes imply or suggest consideration of visual values as a part of the planning and management activities involving the utilization of a resource. Some examples include the Federal Coal Leasing Amendment Act of 1975, the Department of Transportation Act, and the Surface Mining Control and Reclamation Act of 1977.

One of the most definitive statements of the federal position on the importance of visual values as a consideration in the public decision process is found in NEPA, which charges all agencies as follows:

to the fullest extent possible . . .
(2) All agencies of the Federal Government shall . . . (B) Identify and develop methods and procedures, in consultation with the council on Environmental Quality established by Title II of this Act, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical consideration.⁹

The Forest Service has within its corps of landscape architects, environmental planners, and social scientists the expertise to define, identify, and deal with environmental amenities and values within the forest and rangeland environment. The National Forest Landscape Management System embodied in a multi-volume series and section 2383.2 to Title 2300 of the Forest Service Manual provide the technical guidance for working with the visual resource.¹⁰ Numerous computer programs are available for use in analyzing the visual implications of resource management activities such as ski run layout for winter sports developments, layout of timber sales, layout of utility corridors, road layout and construction, development of recreation areas, water project development, and the planning and management of natural areas, floodplains, and wetlands.

For planning purposes it would be desirable to set up a visual resource element in the integrated forest land management plan. The element should contain the visual resource inventory, mapping of the visual absorption capability and

the statement of visual quality objectives for various land capability designations. The visual resource element should contain overlay maps which can be easily transposed to other single resource factor maps. These maps should be part of the land management planning process and as a key step in the NEPA compliance procedure. Planners should examine Volume I for statutory directives regarding visual resources; then the planners should be sure each management situation, plan action, and selection of plan alternative be properly documented to show appropriate statutory compliance.

17. Budgeting

The budget is the principal vehicle for implementing resource management activities embodied in the plan alternative. Normal budgeting and programming procedures will apply to this procedure. These should be clearly stated and graphically illustrated in the plan implementation element.

There are numerous statutes which authorize the Forest Service to engage in specific resource management activities or specific programs such as land acquisition and recreation area development and management. Funding authorities are discussed for each statute. Budgeting procedures are determined by the administration, and program priorities are established through the planning process. The basic legal framework for Forest Service budgeting is the RPA assessment and program which is prepared for Congress on a five-year basis and from which annual budget requests are developed. The intent of Congress in simple terms is to set forth program priorities to correct past deficiencies, direct funds to areas of greatest need and provide the funds necessary to permit the Forest Service to manage the national forests in such a manner as to meet the nation's need for timber, water, forage, and the other stream of renewable resources. Also, as set forth in RPA and the NFMA amendments, Congress specifically requested the development of a fiscal monitoring and reporting procedure so as to provide better information on the expenditure of federal funds for various program activities set forth in the Forest Service budget request. This is a normal procedure in the process of plan monitoring, and it is a means of assessing the degree of internal consistency within the plan as reflected in the actual resource management activities which are carried out on the ground.

Notwithstanding the procedures for program assessment, prioritizing, and adjustment which take place from the field land forest budget request to the appropriation bill signed by the President, the forest plan should clearly show a consistent pattern of budget programming which reflects the final plan alternative and action management priorities. The final plan includes budgeting authorities under all statutes

which provide this express provision in order to implement the statute. Changes made at higher levels and by the Congress can be placed in perspective with the program developed at the local level, thereby safeguarding the plan in the eyes of the public who participated in the plan and who are the local or national constituents of the agency.

18. Intergovernmental (Interagency) Relationships

There is no single statute which serves as an umbrella authority for agency coordination with other federal agencies and state and local agencies. Many statutes either mandate or strongly recommend Forest Service coordination with other agencies. The coordination requirements for each statute are detailed in the planning sheets in Volume I.

The principal directive for intergovernmental and interagency coordination is found in RPA/NFMA. This directive is discussed in detail in a prior section. As a planning procedure the planning teams should prepare a chart or matrix which maps out the coordination linkages at each level of government. Each linkage should be documented with the appropriate statutory reference. The record should chronicle all communications and interactions which have taken place throughout the plan preparation process and which constitute the grist of the plan coordination and implementation process.

A few selected examples of an express directive for specific interagency coordination includes the Sikes Act (coordination with federal and state fish and wildlife planning), the Clean Air Act Amendments of 1977 (coordination and related activities with the appropriate state agency), and the Coastal Zone Management Act of 1972 (coordination and input to the state program where national forest lands fall within a state coastal zone).

Interagency coordination is stressed throughout this chapter. The importance of this vital activity must be understood and accepted by the forest planner and staff. Failure in this activity could lead to numerous problems, program setbacks, and even litigation. The payoffs include smoother plan implementation, more comprehensive resource analysis programs, and a broader base of support for certain agency decisions.

D. PUBLIC INVOLVEMENT

A major emphasis in the RPA/NFMA and the final guidelines for land and resource management planning in the NFS is the need for public involvement on a frequent basis throughout the preparation of the integrated forest land management plan. Sections 219.6 and 219.7 of

the final regulations are devoted exclusively to the nature, extent, and procedure for conducting the required public involvement.¹¹ Literally volumes of material dealing with every conceivable aspect of the subject, including strategies for implementing the process, have been developed by researchers and practitioners. The Forest Service has access to this information and has prepared numerous publications and field level handbooks on public involvement strategies.

From a planner's perspective the need for more not less public involvement emerges as a mandatory requirement in many of the statutes analyzed in the previous material. The forest planner must develop a positive attitude towards the public as a valuable and essential component of the planning process. Public involvement must be relevant, frequent, highly visible, open, personable, and responsive. Public involvement, to meet the statutory requirements must occur in the form of an ongoing dialogue, rather than merely a reactive situation triggered by a proposed activity or use conflict which emerges as a major issue or problem.

The agency, represented by the forest supervisor and forest planner, should be extremely aggressive and responsive to public concerns about the planning and management of the national forests. This action does not have to result in a capitulation to public or interest group petitions, nor even an indication of agreement with ideas or concepts advanced in the public form. Rather the posture should be one of an open, professional dialogue in which the forest supervisor or forest planner can show the public's ideas and requests were considered and evaluated and how the final decision was determined.

Many federal agency personnel appear to take the position that public involvement is a mere courtesy, but not to be taken seriously. Nothing could be farther from the mandate and spirit of the key statutes governing the land management planning process and plan implementation activities. Those planners who hold this belief or are influenced by past attitudinal frames of reference should not be placed in forest or lead planner positions. The Forest Service has had enough good public involvement experiences to develop a mode which is appropriate for the type of planning and public involvement situations it conducts. Certainly the planners and planning team members should be encouraged to go beyond the minimums and open the process to complete public interaction at each stage. The result of this attitude and posture could be pleasantly surprising and yield many unforeseen benefits in the form of enhanced public understanding and appreciation for professional land management, not to mention the diminished possibility of litigation once failure to provide required public involvement or improperly conducted and documented experiences which were termed public involvement are discovered.

E. THE DECISIONMAKING PROCESS

Planning serves as the basis for rational decisionmaking. The legal basis for planning as a prerequisite to the allocation of land resources and the budgeting of funds for specific management activities has been clearly set forth in the preceding chapters.

Forest planners must comprehend and accept the basic fact that the law is the law; it must be understood and complied with if the agency is to maintain its professional posture and integrity in the eyes of the public and the Congress. Recent attempts in Congress to draft highly prescriptive forest management legislation is an excellent example of the pre-emption of professional judgment in favor of specific mandates for dealing with ground level resource management practices.

The point here is that the law mandates a procedure for decisionmaking based on a reasonable analysis of all relevant factors gathered from numerous sources including the prescribed public involvement. The process for arriving at the point of deciding upon a course of action is illustrated in the plan document as a road map which can be understood and followed by a non-technical public. This reaffirms the suggestion to prepare a well-documented, graphically articulated and easily comprehensible document for public use.

Aside from what may appear to be a plea to make the plan a "slick public relations tool," land management decisions and practices based on a sound, well-reasoned planning process lead to better decisions from a legal as well as resource management perspective. Therefore, a decisionmaking process which can pass legal muster in terms of statutory compliance becomes a difficult target for attack on the grounds of procedural or substantive deficiencies. From the planner's and administrator's point of view the selection of an alternative, the decision or commitment to a course of action, and the implementation of the decision should be open and well-documented with the proper authority.

F. THE LAND MANAGEMENT PLANNING PROCESS

The land management planning process as set forth in the proposed regulations is based largely on principles of linear programming. The process is iterative and leads to the factoring out of alternatives which fail to meet selected criteria and resource management guidelines. The guidelines address both the process as an ongoing agency activity and the preparation of the plan document as an end-product of each cycle of plan preparation as set forth in the statute.

The planning process which has evolved in the Forest Service to date appears to be a dual response procedure. The procedure is geared to develop: (a) an issue - solution or resolution strategy response to resource allocation and non-consumptive use problems and conflicts, and (b) a vehicle to allocate renewable resources such as timber and forage to the defined national and regional production goals. Coupled with this is the program budgeting process and a public involvement requirement. The NEPA process pervades the entire planning procedure. A document prepared as the combined forest plan and EIS and containing a mix of narrative, statistical, and graphic elements often lacks a clear explanation of the planning process used to prepare the plan, the derivatives of land classifications or the "plan alternatives," and a clear analysis of each alternative "plan."

There are many components of the forest planning process which are quite difficult to deal with in the normal convention of regulations, manuals, and handbooks. While these media can be extremely prescriptive and detailed, the manner in which they are interpreted and applied is a function of the planning skills and experiences of those conducting the planning process. As an example, after reviewing several work plans for the preparation of a forest land management plan in accordance with early drafts of the regulations, it appears that several key problems exist which need short-term as well as long-term attention and direction from the Washington Office of Land Management Planning staff. There appears to be a concern among some Forest Service planners with respect to the manner in which issues are identified, evaluated, and stated. In many instances there appears to be a lack of knowledge or skill with respect to getting at the heart of an issue. If this is in fact a problem faced by a large number of field personnel, then a substantial effort needs to be focused in this area. Many Forest Service planners have no formal training in planning and very little experience in non-Forest Service land management planning. As a practical matter this area of planning requires a level of sensitivity and in-depth perception of the social-political dynamics at a multi-strata level. Planners as part of their formal training and conditioning are exposed to an issue, problem, or interactive type of environment which is not merely a crisis-oriented response system. Many forest planners have not had this kind of training, have not practiced in this type of environment, and are institutionally conditioned to an operational framework geared to symptoms which often hinder their ability to deal with the real problems.

Planners deal with a thorough knowledge of the resources and systems within their area of jurisdiction as well as peripheral areas which influence their realm of activity. Information obtained from the Forest Service suggests that a comprehensive environmental resource information system is not readily available for many forests. Careful inspection of several forest planning work plans gave some encouragement with respect to in-

formation availability or sensitivity to the need for forest-wide resource data inventory systems. Without such an inventory it is virtually impossible to discuss resource systems and derive land capability. Data should not be collected solely for the purpose of resolving an issue or solving a problem but rather to provide a three-dimensional picture of the land resource system which constitutes the forest. Working from this base the planner can fashion policies, strategies, and programs for allocating resources which should help minimize many subsequent problems, conflicts, or issues.

Many forests do not appear to have a systematic program for collecting, storing, analyzing, and displaying natural, social, and cultural data for the forest and planning region. Inventory activities often times consist only of mapping landforms and vegetation. Soils data may be available but in many instances are not well detailed. Some timber type maps and aerial photographs in current use date to pre-1960. Land capability determinations cannot be derived without a resource inventory. Substituting watershed plans for land capability analysis does not provide sufficient information for assessing land suitability.

It appears as though in some instances a substantial amount of resource inventory information has been prepared for use in what has become known as the single purpose plan. Often the collection of information has been initiated as a result of the need to prepare a special plan or report. The NEPA requirement has resulted in the generation of a substantial amount of ecological, economic, social, and cultural data heretofore not available in a systematic format. Few, if any, forests have the capability to generate computerized maps of single resource elements or to integrate and analyze elements in various combinations for specific interpretations such as land capability or suitability.

The statutory analysis suggests that each forest must be inventoried in a comprehensive manner. This inventory must be comprehensive in the sense of an area which includes the entire forest and its adjacent surroundings; and it must be comprehensive in terms of a variety of resource elements or characteristics included in the inventory. This conclusion is reached after considering a number of factors. Among these, the multiplicity of planning requirements under the various statutes governing the planning, coordination, and management activities of the Forest Service which require a similar multiplicity of data elements on which to base the required planning activities. Volume I of this report identifies over seventy statutes which relate to the various functions of the Forest Service. Obviously, the statutes have been enacted at different times and have covered a broad spectrum of activities. Some legislation has addressed the general planning, coordination, and management functions, while other legislation has addressed

specific activities or programs. As a consequence of this incrementalism it is not surprising that there is a great deal of similarity between the data required for certain similar programs. A single information system relating to the various resource management programs and activities of the Forest Service would certainly result in administrative and economic efficiencies by standardizing certain systems thereby eliminating a multiplicity of non-interrelated often redundant systems.

A comprehensive data base for forest planning will also be of great importance in assuring internal consistency within the administration of Forest Service programs. In simplified terms the judicial concern with internal consistency relates to the proposition that the right hand of the Forest Service should be aware of and be acting in coordination with what the left hand is doing. This concern is for uniform programs as they relate to the administration of public resources and the impact of this management on segments of the public. If the data upon which resource management decisions are based is consistent by virtue of the use of a comprehensive data base for all programs, then in this respect there is some assurance of internal consistency in the administration of programs based on that data.

Even though the development of a single comprehensive data base for forest planning is not specifically mandated by the RPA/NFMA, the development of such a data base could lead to the elimination of costly inefficient data systems thereby producing administrative and economic efficiencies in data acquisition, storage, and retrieval, as well as meeting the legislative mandates for documentation of the planning process.

Certainly, planning activities and programs based on data from anything other than a unified information system will run great risk of failure to meet one or more of the requirements previously discussed. Any such failure in a program offers ample opportunity for litigation over the conduct of that program. Consequently, it is difficult to see how the specific mandates of the NFMA can be achieved without the development of a comprehensive information system for each forest planning program.

Another problem is that many forest planners are not knowledgeable about the legal constraints or legal requirements which must be addressed or dealt with in the plan.

Experience in the field suggests that prior to the enactment of NFMA and the subsequent promulgation of the land management planning regulations, there were many instances at the district and forest level where a need for readily available legal counsel arose. There seems to be a question in the minds of many line officers who oversee planning activities as to where in the planning process developed in the regulations legal input should be provided.

There is a need for improved relationships with the government attorneys assigned to the Forest Service. Several observations suggest that some government attorneys assigned to Forest Service problems have not understood Forest Service land management. Questions have arisen concerning the role of legal counsel in the interpretation of the "lead agency" concept with respect to Forest Service involvement with other federal agencies in joint planning programs.

In addition, the land management plans reviewed in the course of this study were extremely lengthy, difficult to follow, and heavily loaded with technical terminology which is neither explained nor illustrated. The activities, events, treatments, and/or processes were not clearly discussed or portrayed. A planning handbook could provide some guidance with respect to techniques which can be used to organize, present, and display resource data and processes in a meaningful manner. Often what appeared to be a complex situation could have been reduced to a simple, yet adequate verbal and graphic articulation which accurately explained the resource situation. The public can then be better educated and informed by the plan and not confused to the point where they tend to become highly suspect of the material in the plan, including the manner in which it was gathered, aggregated, disaggregated, or treated in the decisionmaking process.

The NFMA mandates the Forest Service to prepare an integrated forest land management plan for each national forest. The plan will provide a systematic procedure for resolving issues, allocating resources, and establishing and implementing the forest land management program. Through this process the seemingly disjointed incrementalism of past program planning, budgeting, and action management activities should cease. All decisionmaking will be incorporated within the framework of a flexible policy plan which, by way of a written document and a highly visible process oriented system, Congress and the various publics can clearly understand the nature of Forest Service land management planning and policy.

Preparation of a comprehensive integrated land management plan requires a systematic redevelopment of the numerous single element or single purpose plans, which by some estimates number nearly ninety, that have been prepared at the forest level over the history of the agency. The integrated or comprehensive plan to be truly comprehensive in nature should be an inclusive document and serve as a single source for all key data relevant to land management planning and decisionmaking. Supporting documents may be prepared for specific management activities at the operational or functional level of planning. Land resource planning data should be appended to the plan where this data cannot be easily displayed on computer or hand-drawn maps.

The plan document should be an interesting and attractive publication which is easily read and understood by the public. The plan document is not an in-house technical report for exclusive communication among agency personnel.

The document should address each step of the process. Use of maps, charts, tables, and graphics is encouraged. Documentation should be in the form of textual footnotes. Technical appendices should be used for vast amounts of tabular data, statistical analysis, and computer output such as derived from the linear programming applications. Each model, computer program, analysis, or calculation used in any step of the plan should be clearly explained in non-agency or "systems" jargon. The plan document should create a sense of understanding, confidence, and appreciation of the profession of forest land management not a credibility gap from uncomprehensible reports which many members of the public have come to refer to as agency mumbo jumbo.

The issue of data requirements for land management planning has been discussed in a previous section of this chapter. The need for a comprehensive data base cannot be stressed with any more emphasis and importance. The Forest Service must devise cost-effective, responsive, and rapid procedures for inventory, storage, retrieval, manipulation, and display of ecological, cultural, social, and economic information required to engage in a truly comprehensive integrated land management planning process. Numerous procedures and systems for data inventory and information handling are readily available within the Forest Service and elsewhere. A unified action with agency-wide minimum requirements should be the bottom line of activity to be implemented at the time an integrated planning process is activated.

There appears to be a need to develop a characterization of the planning process which is more in step with concepts and procedures set forth in the regulations. A part of this characterization should include a total reorientation of the professional frame of reference within which the forest planner functions. This reorientation can be accomplished through in-service training and highly specialized study in several graduate planning programs at major universities. The forest planner should lead the interdisciplinary team through the plan preparation activities as well as be the principal spokesman for the planning process as issues are resolved within the policy framework of the plan. The planner must be much more than a disciplinary specialist, computer programmer, linear programming specialist, or field level technician. This capability to practice the nuances of planning is just as important as, if not more important than, running a linear program or preparing the physical document. These skills are manifest in a more pronounced fashion when the planner and staff represent the forest in various levels of public involvement situations.

As a footnote to this observation the tenure of a forest planner should be carefully analyzed. The current practice of short duty rotations does not seem to provide adequate time for the planner to really get into the planning process, to gain sufficient and comfortable knowledge and familiarity with the internal and external management situation, and to be able to prepare a plan, interact with the state and local community, and guide the forest through several years of implementation which include whatever revisions and amendments are necessary to improve the plan and land management practices.

A major semantic problem which seems prevalent in various sections of the agency is the distinction between "comprehensive plan" as either an object or process. Comprehensiveness refers to the procedure of integrating into one object the numerous elements or documents which heretofore may have been defined as a comprehensive plan. Process involves not only preparing the object, but also the more involved and on-going activity consisting of the daily encounters, challenges, interpretations, and emergence of new issues which are dealt with by the planner as the planner and the staff provide policy interpretation, management strategies, and option assessments for the forest supervisor and associated decisionmakers. Lay and professional usage of these terms will often vary in terms of the definition and interpretation of what is a "plan" and who or what is a "planner," as has been the experience in other areas of comprehensive planning, such as found at the urban and regional level of community planning. Planners should emerge as distinct and qualified professionals who engender credibility in their person as well as product. Given the divergency of opinions regarding the land management planning regulations and the high level of suspicion which seems to exist within many industry and public interest groups, it is important that the forest planner be a skilled and knowledgeable practitioner.

Numerous references have been made to the plan as a policy document to link the process of alternative selection with implementation through a series of management activities. Implementation of land management programs requires the programming and budgeting of funds for activities such as land acquisition, transportation development, harvesting and renewing renewable resources, developing and maintaining recreation areas, cultural treatments for aesthetic objectives, and resource protection programs. A key requirement in the preparation of the plan is to achieve internal consistency through the entire plan, consistency which, in the absence of forces beyond the control of the forest decisionmaking unit, is clearly reflected in the action management program. In the case of the forest level management this is most easily displayed in the program priorities and funding requests.

In the same vein, the plan should serve as a forum for advancing new concepts and strategies for resolving use conflicts and issues, increasing the productivity of renewable resources, and minimizing the adverse effects of removing the nonrenewable mineral resources from forest and rangelands, particularly the hard rock mineral and oil and gas resources. Planners should use their experience and knowledge to help fashion acceptable and workable strategies for resource utilization much in the same manner in which urban planners have developed innovative performance standards to accommodate more novel and flexible forms of land use guidance systems. This certainly can be the case with respect to areas such as aesthetic treatment of silvicultural practices, mineral exploitation and development, mined land restoration, road construction, land shaping and revegetation, utility corridors and structures, permits for recreational developments, forest service recreation areas, and construction of forest protection facilities and structures.

An area of concern which should receive in-depth treatment in the integrated forest land management plan is the linkage of the forest land area and use of that area to local communities within a regional and/or state context. This issue, which has been the focal point of discussion with respect to timber management, also has critical implications with respect to activities such as watershed management, grazing, visual backdrops, power corridors, transportation, and the designation and development of passive and active recreation areas and facilities.

Each situation has a unique set of direct and indirect effects which ripple out and touch local communities with a variety of social, cultural, economic, and environmental effects. The preparation of the corresponding environmental impact assessments should lead to the identification and analysis of many of these implications. Experience in the area of all season resort developments which rely on a permit to use national forest land for a major portion of the recreation facility suggests that these developments trigger a host of severe impacts on local communities. Often these impacts are not viewed by local residents as desirable situations, as many promoters tend to portray the desirable economic features of a development. When problems of inadequate employee housing, health services, crime, drugs, education, inflated land values, traffic congestion, erosion of a prior life style, and environmental degradation occur as a result of a Forest Service land management decision, then the Forest Service should take the initiative as a lead agency to help develop planning strategies to fashion federal, state, and local programs to deal with these and other kinds of programs.

This leads to the suggestion that a major section of the plan be addressed to the relationship of the forest land unit to adjacent lands and the regional setting in which land management takes place. Forest planners must learn to look

and act outward from the internal concerns of the forest for which they are immediately responsible. The regulations address this part of the analysis of perceptions, sensitivities, and knowledge of regional interrelationships and socio-cultural and political infra-structure of various communities, groups, and strata within the effective "fallout" range of major forest land management decisions. Forest Service planners need to be actively involved in local, town, community and county planning, regional planning, and where appropriate state land resource planning agencies in order to establish the appropriate linkages with key situations and activities which are or will occur within the forest system. Valuable experience in learning how to lock into these agencies and processes can be gained through frequent formal and informal contacts with non-Forest Service planners and membership in the national professional organization for planners. Forest Service land management planners need to break out of a purely "forestry" or agency mentality and become more diversified in terms of scope, perception, and range of planning skills. This will greatly enhance the quality of the planning, both in terms of the planning analysis and public involvement activities, as well as the actual preparation of the plan document. Also, this association with the regional community of planners can enhance communication channels, particularly in those areas where traditionally the association was virtually non-existent or limited to formal interagency or regional federal commission or compact associations.

The issue of single use or special area designations has been discussed in the context of specific statutory requirements. The best example of this type of area on a national forest is a statutory wilderness area, a national recreation area, a national trail area, national monument or historic site, or national wild or scenic river designation. A separate section or element of the plan should be designated for each special area that exists on the forest at the time work is initiated on the integrated forest plan. Where candidate study areas have been identified, special planning treatment should be prescribed. In certain instances special area and/or use studies may be required prior to action to amend or revise the plan. Often these types of studies are mandated by the Congress, accompanied by a special appropriation to finance the work. Special planning teams or task forces are usually established to conduct these activities. Management planning and implementation is assigned to a district, forest, or region at the operational level of activity.

Review of several forest plans left some confusion as to the nature of planning and management for single or specific use areas as opposed to lands managed under the multiple-use concept, even to the extent where certain uses appeared to be the principal use or management activity. This situation should be clarified to a much greater extent in the new generation of plans

through application of recent analytical and programming strategies for multi-resource analysis and management.

Incorporated as an integral part of the integrated land management plan is the environmental impact statement which responds to the plan alternative selection, analysis, and implementation. The NEPA procedures, as detailed in the CEQ regulations, are helpful in the process of selecting, discussing, and analyzing alternative courses of action.

Preparation of the EIS requires the use of the same resource data gathered for planning purposes. More detailed information may be required for specific kinds of analytical procedures used in conjunction with the treatment of a specific alternative. It is interesting to observe the emphasis in NEPA and the regulations on the consideration of environmental amenities which include visual resource values.

The regulations require a program EIS for each major resource management activity. Further, the agency must prepare a threshold determination to find whether the activity, as can be determined by the state of the law, should be considered a major federal action for which a separate EIS must be prepared. This phase of activity will take place as the plan alternative is converted to specific resource management activities and programs at the operational level of forest and district planning. These kinds of activities constitute the bulk of what has come to be known as multiple-use forest land management. Major federal actions within the area of forest land management consist of activities such as timber harvesting, road construction, granting of special use permits, controlled burning, insect or disease control, brush control, construction of recreational facilities, or management structures or wildlife management practices and reforestation treatments.

For each proposed activity or treatment the responsible unit or party must determine the full extent of the actions and the best possible assessment of the scope of impact, be it local, regional or national in magnitude. The statement must not be whether the activity is an individual project or treatment or an independent component of a larger, more comprehensive project, *e.g.*, a road construction activity which is part of a large timber sale operation which involves timber harvesting, hauling, earthwork, planting, and possibly the development of some recreation facilities such as campgrounds, trails, scenic turnouts, and picnic areas.

The regulations require that an EIS be prepared for all reasonable alternatives identified through the planning process. The standard of reasonableness has been clearly defined for all real as well as hypothetical or speculative alternatives. Given the variety of analytical techniques and display procedures available for alternative assessment it is not practical at this time

to recommend a particular strategy. The regulations suggest the use of the matrix analysis which can be applied in conjunction with other procedures used in the planning studies and analytical treatments. Reference to specific legal guidance is suggested when in doubt as to preparing the alternative analysis.

It can be argued that the major significance of the RPA as amended by the NFMA is the emphasis on the spirit or attitude with which planning is to be pursued by the Forest Service and its individual representatives. The NFMA may be interpreted as an expression of the public and congressional dissatisfaction over the perception that the past agency response has been toward minimum compliance with past congressional, executive, and judicial mandates for complete, thorough consideration of consequences prior to changes in policies or programs and to implementation of specific projects.

G. THE PLAN

Recognizing local and regional variations, individual skills, attitudes, and approaches to planning, there should be a set of minimum elements which should be part of each forest plan. These elements should be uniform, consistent, and relate directly to key provisions of NFMA, key statutes, and the regulations. While this may appear to be constraining the flexibility and innovativeness of the forest planner or interdisciplinary team, even to the extent of becoming highly prescriptive, the action will insure uniformity in procedure, structure, and statutory compliance. It should result in a greater degree of internal consistency within the plan. Also, this process can lead to reduced costs at the forest, regional, and national levels.

The suggested procedure has precedent in many state planning enabling acts, a good example of which is the California General Code section 65301, Content of the General Plan.¹² The planning handbook should provide an array of techniques and approaches to permit maximum flexibility in incorporating the optional or discretionary plan elements. Many of the optional elements will reflect certain unique forest, local, or regional conditions or situations and will require the planner and interdisciplinary team to fashion these in such a manner as to be responsive and applicable to resolution of issues and solution of problems. Policy formulation for tactical and operational levels of planning fit within this category.

Review of the statute and regulations indicate a lack of clear guidance with respect to the development of a framework upon which the actual plan document can be prepared. The following offers a proposed plan framework, one which is consistent with the statute and regulations and which could be prepared in a manner

which would be not only cost-effective but which would result in a document easily comprehensible by the public.

The Integrated Forest Resource Management Plan shall contain, but not be limited to, the following components:

- (1) A purpose statement indicating the objectives for preparing the plan.
- (2) Goals and objectives for the forest and the immediate region.
- (3) Inventory, analysis, and synthesis of natural, cultural, social, economic, legal, and institutional resources and/or conditions and current land uses within and adjacent to the subject forest.
- (4) Specific plan elements dealing with: land ownership, transportation element, recreation element, timber element, range element, watershed element, wildlife element, wilderness element, air pollution element, water quality element, cultural resource element, natural areas element, visual resource element, natural hazard element, mineral element, and any other elements to which the interdisciplinary team deems necessary to properly evaluate and manage the resources of the subject forest.
- (5) Assessment of land capability.
- (6) Enumeration of local, regional, and national needs for goods and services and uses as related to the subject forest.
- (7) Proposed policies, standards, guidelines, and criteria for guiding land and resource management practices.
- (8) Alternative approaches for accomplishing the goals and objectives, resolving issues, and meeting needs for goods, services, and uses based on land suitability.
- (9) Implementation strategies--budgets, management practices, construction, operation, and maintenance activities required to accomplish the objectives and resolve the issues within the context of the alternative selected through an environmental analysis consistent with the National Environmental Policy Act and its implementing regulations and guidelines.
- (10) Monitoring and evaluation procedures.
- (11) Bibliography and appropriate references and citations.

These components can be developed in a variety of formats which permit the preparation of specific sections, elements, or chapters which respond to individual statutory requirements and the regulations.

As previously suggested, a national forest planning handbook could be prepared to illustrate several acceptable procedures or formats which are in compliance with statutes and regulations as well as correct in the procedure for dealing with issues, problems, public involvement, analysis of the management situation, and formulation of the plan.

The forest planning process as an administrative entity should be at a level above the single resource management staff functions. The forest planner should be linked directly to the forest supervisor. At the operational level, the staff specialist for an area or program should prepare and administer field-level plans for various developments, management activities, and land treatments. This procedure parallels the NEPA process and as such provides a tool for fashioning specific on-the-ground resource management programs as well as monitoring programs which link back to the annual program assessment and budgeting process. This linkage is important in terms of the statutory requirement for monitoring planning activities and measuring outcomes from specific operational activities, prescriptions, and treatments.

H. REFLECTIONS ON INTEGRATED FOREST LAND MANAGEMENT PLANNING

A mere listing of the legislative, executive, and judicial mandates for specific actions to determine the minimum levels of agency involvement for compliance is insufficient as the sole basis for planning. The various mandates include general language which will always have the potential for future judicial, executive, or legislative, expansive interpretation to include responsibilities not previously specified by written document. Therefore, a minimum list of specific requirements based on past legislative, executive, and judicial pronouncements will always be subject to accusations of being too limited and incomplete and, consequently, subject to future expansive elaboration by judicial, executive, or legislative review. In other words, the use of such a limited list of considerations will always run the inherent risk of being judged as an insufficient basis for meeting the broad comprehensive planning for environmental, economic, and social considerations stipulated by the general terminology of various statutes, executive orders, and court decisions.

The general terms used by the legislative, executive, and judicial bodies reflect the broad intent of the authors. General language reflects the concern for general, overall, all-inclusive, total evaluation and resolution of issues and problems. Consequently, any semantic narrowing of this intent will always be inherently and necessarily suspect and subject to future judicial, executive, legislative, and popular criticism. The only secure posture for the Forest Service to

adopt in preparing a legally defensible planning program is the acceptance of the intent of Congress to undertake comprehensive consideration of all potentially significant consequences of agency policies, programs, and projects.

The planning program described herein adopts this general spirit of systematic, comprehensive, integrated land management planning. Wherever existing statutes, executive orders, administrative guidelines, and court decisions relate to either general or specific elements of this system, they have been noted to assure compliance with the existing authority as specified in the written record. However, the planning program is designed to be substantively complete and technically sound in keeping with the general legislative, executive, and judicial intent for comprehensive and integrated planning in order to be legally defensible if challenged on these grounds in the future.

The suggestions developed in this chapter have been directed towards a single objective in forest land management. Stated in simple terms, that objective is the preparation of an understandable and legally defensible forest plan that is in statutory compliance with the authorities discussed throughout this report. A commitment to accomplishing this objective is a major step in the direction of achieving a technically sound, graphically articulate, and legally correct land management plan. In this sense, the plan should be defensible from judicial attacks based only on legal technicalities.

A planning step which should be incorporated into each step of the plan development process might be termed a "probable litigation test (PLT)," the devil's advocate test, for each plan element. Through the PLT the interdisciplinary team and legal consultant can methodically shake down each plan element to isolate any omissions or errors in statutory compliance that would be acted on by a potential litigant. The same procedure is used in local land use planning where draft plan language and ordinance language is tested by the staff and legal counsel prior to its preparation for public review or adoption by the legislative body.

An important, perhaps the most significant, conclusion of this study is the importance of knowledgeable legal counsel as part of the planning team. It has been observed in reviewing several forest plan proposals that no lawyer was even mentioned as a critical member of the team. Suffice it to say that each forest should have legal counsel available as an integral part of the planning team. This input should help insure proper statutory compliance and correct language drafting throughout the entire plan. Such an investment at the onset will result in considerable savings of time and money as well as a more professional plan and environmental impact statement.

NOTES

¹16 U.S.C. §§ 1600-14 (1976).

²42 U.S.C. §§ 4321 et seq. (1976). See Chap. IV, supra, for a detailed discussion of NEPA.

³5 U.S.C. §§ 551-59 and 701-06. See Chap. V, supra, for a detailed discussion of the APA.

⁴The discussion throughout Chapter VI draws heavily on the legal analysis of the major statutes affecting the land management planning functions of the Forest Service. See Chaps. I-V, supra.

⁵16 U.S.C. § 1604(g) (1976).

⁶Id. at § 1604.

⁷Id. at § 1608(a).

⁸H.R. REP. NO. 88-1920, 88th Cong., 2d Sess., reprinted in [1974] U.S. CODE CONG. & AD. NEWS 3994.

⁹42 U.S.C. § 4332(2)(B) (1976).

¹⁰USDA Forest Service, FOREST SERVICE MANUAL, Title 2300, § 2383.2, Visual Absorption Capability (1978).

¹¹44 Fed. Reg. 53,928, 53980-81, National Forest Systems Land and Resources Management Planning (1979) (final rule).

¹²CAL GOV'T CODE § 65,300 (West).